No. 87-1557

In the Supreme Court
of the United States

OCTOBER TERM, 1987

1000 FRIENDS OF OREGON,
the assumed name of Oregon Land Use Project, Inc.,
an Oregon non-profit corporation,
KELLY McGREER, ROSEMARY McGREER,
JAMES G. PERKINS, SHIRLEE PERKINS,
DAVID DICKSON and MELINDA DICKSON,
Petitioners,

v.

WASCO COUNTY COURT, DAVID KNAPP,
RICHARD DENNIS SMITH,
KENT BULLOCK, SAMADHI MATTHEWS,
Respondents,

CITY OF RAJNEESHPURAM and
RAJNEESH FOUNDATION INTERNATIONAL,
formerly
CHIDVILAS RAJNEESH MEDITATION CENTER,
Respondents.

PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

Whether federal due process requires invalidation of a county government's "quasi-judicial" land use decision when a county official casting one of two deciding "yes" votes fails to publicly disclose at a hearing on the matter, a pending oral agreement to sell 48 cattle for $17,540 to the applicant for the land use approval, where the pending cattle sale was (1) needed financially by the seller/official fact-finder, (2) irregular in several respects, (3) concealed by the applicant for the land use approval from the county district attorney who inquired about it, (4) based on an above market price, (5) not consummated in terms of delivery of cattle or payment to the county official until 5 and 11 days, respectively, after the county official voted "yes."

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PETITION FOR WRIT OF CERTIORARI TO

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1000 Friends of Oregon, et al, petitions for a Writ of Certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. A, infra)[1] is reported at 304 Or 76, 742 P2d 29 (1987), petition for reconsideration denied, (App. B, infra), November 24, 1987. The opinion of the Oregon Court of Appeals (App. C, infra) is reprinted at 80 Or App 532, 723 P2d 1034 (1986). The opinion of the Oregon Land Use Board of Appeals, LUBA No. 81-132, (App. D, infra) is reported at 14 Or LUBA 315 (1986).

JURISDICTION

1 Appendixes A through E are separately bound as Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Oregon. Appendix F follows the text of this petition and begins with page A-110. All references to App. ___, A-___ are to the above appendixes. Other references are to the record below.

The decision of the Oregon Supreme Court was filed September 9, 1987 (App. A, infra). The petition for reconsideration of 1000 Friends of Oregon, et al was denied November 24, 1987 (App. B, infra). On February 20, 1988, Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, ordered that the time for filing the petition for writ of certiorari in this case be extended to and including March 14, 1988 (App. E, infra). The jurisdiction of this court is invoked under 28 USC Section 1257(3).

STATEMENT

Petitioners[2] seek review of an order in which the Oregon Supreme Court, reversing the Oregon Court of Appeals, upheld an Order of the Oregon Land Use

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2 1000 Friends of Oregon is a nonprofit corporation formed in 1974 to support implementation of Oregon's land use laws. Individual petitioners own ranch properties ajacent to or near the land sought to be incorporated.

Board of Appeals (LUBA) and held that certain undisclosed business dealings between Wasco County Judge Richard Cantrell and those seeking to incorporate the City of Rajneeshpuram did not invalidate Cantrell's quasi-judicial vote in favor of holding an election on a petition to incorporate the city. 1000 Friends of Oregon v. Wasco County Court, (App. A, infra), 304 Or 76, 742 P2d 29 (1987). The land proposed for incorporation was a 2,135 acre portion of a 64,000 acre ranch in single ownership.

1. The undisclosed business relationship between Judge Cantrell and the land use applicant.

The Oregon Court of Appeals stated LUBA found the following facts:

> Cantrell visited Rancho Rajneesh (the former Big Muddy Ranch) in August, 1981, together with other members of the Wasco and Jefferson County Courts. At that time representatives of the ranch--who were also representatives of the petitioners for incorporation--told Cantrell that they were interested in buying cattle. In early October, Cantrell and his wife dined at the ranch, and

one of its leaders again raised the subject of buying cattle. Cantrell recommended that they buy "hamburger grade" cattle, which happened to be what he had for sale. He thereafter told the two Wasco County commissioners that he intended to sell cattle to the ranch, but he did not publicly disclose his dealings before the county court acted on the incorporation petition. He formally proposed to sell cattle to the ranch in a letter[3] dated October 13, 1981, after the county court had rejected the original incorporation petition as legally deficient. On October 14, representatives of the proposed city presented a corrected petition.

Rancho Rajneesh leaders were conscious of the effect Cantrell's sale of cattle might have on his vote on the incorporation petition. One of the leaders asked the ranch foreman to keep the sale low-key so as not to embarrass Cantrell. Ma Anand Sheela, one of the ranch leaders, told the foreman to pay Cantrell's asking price, because 'we needed him.' On October 22, Cantrell and ranch officials reached an agreement on the sale. (App C., A-42-43)

It is uncontroverted that no deposit was paid, that the agreement to purchase

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3 Cantrell's letter stated "I'm going to have to sell alot [sic] of mine [cattle] because the wheat crop wasn't large enough to pay my bank loan the 1st of November." (A-19).

cattle was never put in writing, and that Cantrell typically sold locker beef to local buyers in small quantities.[4]

LUBA did not comment on the following uncontroverted evidence of Cantrell's financial circumstances. During the period 1975 to 1983, Cantrell Ranch was financed through annual lines of credit issued by a local bank. Repayment in full was due on the final day of the credit year, ordinarily in the month of November. D. Hunt 10-13 (A-92 to A-95).

Unlike most farmers in the Dufur area, Cantrell regularly failed to pay off his line of credit by the due date. Id. 50 (A-100). During this period, 1975 was the only year in which he succeeded in

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4 "Locker Beef Our Specialty" is imprinted on Cantrell's business checks. Locker beef is generally sold in small quantities to individuals for their personal lockers. (D. Cantrell, p. 163) The summary of Cantrell's bank deposits between December 18, 1980 to September 21, 1985, indicates that 306 of 358 deposit entries were in amounts of $500.00 or less, illustrating Cantrell's ordinary business dealings. Hunt Ex 5.

repaying the loan on time. Hunt Ex. 2. During the period 1975-1980, Cantrell's bankers described his ranch as marginal on the forms they used to advance credit. D. Hunt 49 (A-99); Hunt Ex. 2.

In September, 1981, Cantrell sold his wheat crop for $33,476.58 and made payments to the bank on his line of credit in that amount. Even with these payments he still owed the bank $16,500.60 and had no funds remaining available to him from the line of credit, which he had exhausted in July. Hunt Ex. 2.

Needing operating funds, Cantrell obtained a $14,000 short-term bank loan due on December 15, 1981, a time by which Cantrell ordinarily would receive bank approval for his 1982 line of credit. D. Hunt 28 (A-98). Cantrell had never before been forced to borrow against the following year's credit line. Hunt Ex. 2.

In 1981, expenses at Cantrell Ranch

exceeded receipts by nearly $33,000, compared with a cash shortfall of only $5,406 the preceding year. Pet. Ex. Q, Schedule 1 (App-4). During the period 1978 through 1981, Cantrell's total indebtedness increased by $114,427. Id., Sched. 2 (App-5). Over those four years, Cantrell claimed a $98,791 increase in his net worth. Id., Sched. 3 (App-5). However, this increase was due solely to Cantrell's estimates of increases in the value of his real property, based on Cantrell's beliefs about the worth of those assets, not on generally accepted accounting principles. Tr. 238 (A-110).

By October, 1981, when he offered to sell cattle to Rancho Rajneesh, Cantrell had sold all his crops, and had already sold as much locker beef in 1981 as he had projected selling that year. Hunt Ex. 2. Given his debt of $16,500, he also faced the prospect of a substantial carryover

on his 1982 line, which he had already borrowed against.

Around the lunch hour on November 4, 1981, and prior to the county's hearing on the incorporation matter, Wasco County Roadmaster Rex Kniestad informed Wasco County District Attorney Bernard Smith of a rumor that Cantrell was doing business with Rancho Rajneesh. Smith informed Rancho Rajneesh leader Krishna Deva of the rumor and asked if it was true. Tr. 30-31. (A-113,113). Deva knew at this time that a cattle deal was pending between Rancho Rajneesh and Cantrell. D. Deva 8-10 (A-77 to A-79). Deva contacted Rancho Rajneesh manager Jayananda, who had authorized purchase of the cattle, then returned to Smith and told him that there were no business dealings between Rancho Rajneesh and Judge Cantrell. Tr. 31 (A-113). Smith did not check the rumor with Cantrell because he thought the rumor

was "preposterous" and thought he would be insulting Cantrell to ask him about it. Had he known about the sale, he would have advised Cantrell to disclose it. (A-112-117); D. Smith 16-22 (A 119-125).

At the conclusion of the public hearing that afternoon Cantrell voted "yes" in a 2-1 vote, approving the incorporation petition. The County Court also adopted an order supported by 40 pages of findings of fact and conclusions that the incorporation conformed to:

> applicable provisions of ORS Chapter 221, the Statewide Planning Goals approved under ORS 197.005 to 1974.430, and the Wasco County Comprehensive Plan.

Neither Cantrell nor Rancho Rajneesh leaders testifying at the hearing disclosed the pending cattle sale.

On November 9, Cantrell delivered the cattle to ranch representatives. On November 15, a check for $17,540 was issued to Cantrell for the cattle.

On November 17, 1981, Cantrell deposited the check with the U.S. Bank. Hunt Ex. 4.

Cantrell sold 48 cattle. LUBA found that the price paid for nine cow/calf pairs exceeded general market value by approximately $150/pair, or $1,350 for the nine pairs. Id. Tr. 353-354 (A-138,139).

For the cattle sold by weight at $.50/pound, LUBA found that the 30 cattle weighing 23,830 pounds would have brought "several cents less per pound at the nearest auction year." (A-20).

LUBA was not more specific. For purposes of illustration, if "several cents" means five cents, the price difference would be $1,192. Together with the $1,350 above-market payment on the cow/calf pairs, the total overpayment would be $2,542.

2. Proceedings in review of Wasco County's November 4, 1981 land use approval.

On January 8, 1982, 1000 Friends of Oregon appealed Wasco County's approval to the Oregon Land Use Board of Appeals (LUBA) alleging, inter alia, denial of "an impartial tribunal" guaranteed by Fasano safeguards and "14th Amendment Due Process Requirements" (Sixth Assignment of Error, Pet. for Review, page 23, January 8, 1982, LUBA No. 81-132).

On March 12, 1982, LUBA dismissed the petition on jurisdictional grounds saying the county's decision was not a "land use decision" subject to LUBA's power of review. 5 Or LUBA 133 (1982).

The Oregon Court of Appeals reversed LUBA, holding that counties must apply state land use goals to incorporation decisions, and describing the county's decision as:

> the final quasi-judicial, discretionary decision that the county can make on application of the goals to incorporations, and as to incorporation itself.

1000 Friends of Oregon v. Wasco County Court, 62 Or App 75, 80-81, 659 P2d 1000, rev. den. 295 Or 359 (1983).

On September 30, 1983, on remand, LUBA issued a second opinion concluding that Wasco County's order violated statewide planning Goals 3 and 14. It also declared moot petitioners' allegation that petitioners' were denied an impartial tribunal. (App. F, A-116).

In upholding petitioners' standing, LUBA also found each individual petitioner had property interests adversely affected by the incorporation approval. (App. F, A-111-113).

An appeal of that order resulted in a second remand to LUBA, this time from the Oregon Supreme Court. The Court described the County's decision-making as follows:

> [A]t the hearing the county county heard testimony pertaining to whether the proposed incorporation satisfied the requirements of ORS 221 and complied with the requirements of statewide planning goals. The county court made

> extensive findings on the matter of compliance with the statewide planning goals, fixed the boundaries of the proposed city, and authorized a special incorporation election. 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 348-49, 703 P2d 207 (1985).

Disposing of all but two allegations of error, the Court reversed LUBA on the mootness of the impartiality issue and framed the issues on remand as follows:

> (1) [w]hether the county court's Goal 3 suitability determination that 'the areas proposed for incorporation is not suitable for farm use' is supported by substantial evidence in the whole record; and
>
> (2) [w]hether the Wasco County judge acted improperly, with prejudice of substantial rights, rendering the Wasco County Court order invalid? Id. at 376.

Petitioners were then able to obtain an order allowing depositions to be taken on the issue of an impartial tribunal.

After evidentiary hearings, filing of a prehearing order, argument, and briefing, on March 14, 1986, LUBA issued its order. LUBA concluded Wasco County's

approval of the incorporation petition violated LCDC's Goal 3 (Agricultural Lands) but that Judge Cantrell's business dealings with the incorporators:

> do not show the vote on the incorporation was a direct result of the business dealings or that Judge Cantrell had prejudiced his decision as a result of his relationship with the cattle purchasers. We therefore find that Judge Cantrell did not suffer bias as a result of his business dealings. Because we do not find bias, we do not find prejudice to petitioners' substantial rights. (App. D, A-95-96); full statement of LUBA's findings on impartiality can be found at (App. D, A-80-90).

On May 14, 1986, the Oregon Court of Appeals reversed LUBA. It held petitioners' statutory right of standing to challenge county action violating state land use law was a "property interest" entitling them to an impartial decision-maker. (App. C, A-50-51). It also held that Cantrell's activities denied petitioners' 14th Amendment due process rights to an impartial

decisionmaker:

> Cantrell should have disclosed his dealings with the ranch officials and, having failed to do so, was disqualified to sit on the petition for the incorporation election. Although we do not expect part-time local government officials--nor do we expect part-time arbitrators--to forego their normal business activities, when those activities include doing business with one of the parties who will be affected by a quasi-judicial decision, an official must disclose the business relationship to other affected parties. Because Cantrell did not take even that step, we need not decide whether he could have participated after disclosure if petitioners had objected. Under the circumstances, his participation made the county's action void. 1000 Friends of Oregon v. Wasco County Court, 80 Or App 532, 539 (App. C, A-55).

On September 9, 1987, the Oregon Supreme Court reversed the Oregon Court of Appeals. Because petitioners were "aggrieved" and thus able to invoke review, "property rights" of other parties entitled to due process could be affected. The Court thus reached the 14th Amendment issue.[5] (App. A, A-28) However, the

5 Once a property interest is at risk,

Court held that Wasco County's decision could be invalidated on federal due process grounds only if there was a finding of "actual bias" on the part of Cantrell in favor of the land use applicants, or a finding that "Cantrell gained" by voting to approve the land use application. (App. A, A-35)

CONSTITUTION

Resolution of this case requires interpretation of the United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

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the holder of that interest has standing and is entitled to procedural due process. Under Mathews v. Eldridge, 424 U.S. 319 (1976), the nature and extent of that interest will be considered in determining how much process is due, not whether it is due at all.

person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE PETITION

> The running, ugly sore of zoning is the total failure of this system of law to develop a code of administrative ethics. Stripped of all planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused ad hoc injunctions of bewildered courts.

R. Babcock, The Zoning Game, Univ. of Wis. Press (1962) p. 154. (emphasis supplied)

This petition presents the Court with an opportunity to determine whether the 14th Amendment voids a municipal land use decision dependent on impartial, contested factfinding when one of two local officials voting "yes" in a 2-1 decision fails to publicly disclose the existence of a substantial and favorable business transaction then pending between the official and the land use applicant.

A ruling on this issue by this Court will clarify how federal due process can serve as a minimum standard of fairness for municipal land use decisions which regulate the use of a particular piece of property.

1. At least seventeen states characterize some aspect of municipal land use decision-making as quasi-judicial or adjudicatory. Such characterization requires application of federal due process protection.

This Court's land use decisions over the past sixty years have focused on the constitutional sufficiency of two kinds of state and local land use "legislation." First, this court has determined whether regulation of real property has a substantial or rational relationship to a legitimate state interest.[6] Second, this

6 See Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (regulation must have substantial relationship to public health, safety, morals, or general welfare); Penn Central Transp. Co. v. City of New York, 439 U.S. 883 (1978) (aesthetic considerations held to have substantial relationship to legitimate state interest in improving quality of city life); Belle Terre v. Boraas, 416 U.S. 1 (1974)

Court has applied the Fifth Amendment[7] prohibition against taking of property to determine whether land use regulation impermissibly restricts the use of real property.[8] However, this Court has had

(ordinance limiting households to no more than two unrelated people upheld based on rational relationship to a permissible state interest); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (special use permit requirement for retarded group home violates the equal protection clause as there is no rational relationship to a legitimate state interest to justify the disparate treatment).

7 "No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. By incorporation into the 14th Amendment, U. S. CONST. amend. XIV, these protections have also been made applicable to the states.

8 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition against mining coal was a taking of property); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (requirement of free public access to newly-created lagoon in private development project was held a taking of property); Keystone Bitumnious Coal Asson. v. DeBenedictis, 480 U.S. ___, 107 S.Ct. 1232 (1987) (prohibition against mining coal directed at public purpose upheld in face of general attack on regulation); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles 482 U.S. ___, 107 S.Ct. 2378 (1987) (if a taking is found, damages flow from date of

infrequent opportunity to insure that constitutional standards of procedural fairness apply to municipal land use decisions because, until recently, most local land use decision-making was considered "legislative" in character.

In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) this Court was unable to reach the question of the applicability of Fourteenth Amendment due process to the fairness of a municipal decision determining the right to a particular use of a particular parcel, where the state characterized the municipal land use decision as "legislative." The case involved a referendum on a proposal to change the zoning on eight acres to

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enactment of local legislation, not date of judicial determination); Nollan v. California Coastal Comm'n, 483 U.S. ___, 107 S.Ct. 3141 (1987) (conditioning building permit on lateral public beach access held a taking of property because unrelated to public purposes stated in applicable land use regulation).

construct a high-rise apartment. Noting "it is elementary that the decision-maker must be impartial," 426 U.S. at 693, Justice Stevens, dissenting, said

> when we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process the fact that a state may give it a "legislative" label should not save an otherwise invalid procedure. Id. at 686.

Mr. Justice Brennan joined in this dissent. Mr. Justice Powell dissented on other grounds.

The majority, Berger, C. J., did not reach the procedural due process issue in part because it deferred to the Ohio Supreme Court's characterization of the City of Eastlake's referendum on the eight-acre rezone as "legislative." Id.at 673.[9]

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9 The majority concluded this exercise of the legislative power was not subject to attack on the ground that it was a standardless delegation of legislative power because the power of referendum had been reserved to the people of Ohio by the Ohio constitution. Hence, no delegation

However, the factors which prevented the majority in Eastlake from reaching due process issues do not exist here. The Oregon courts held Wasco County's decision to approve the incorporation petition was quasi-judicial.

More important, the increasing number of states that now characterize some municipal land use decisions as quasi-judicial[10] makes it important that

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occurred. Accordingly, the majority reversed the Ohio Supreme Court which, on federal constitutional grounds, had invalidated the city's land use decision on a standardless delegation theory. 426 U.S. 679.

10 Land use decisions affecting individual rights in particular property have been considered adjudicatory in nature by at least seventeen states and D.C. Fasano v. Bd. of County Comm'rs., 264 Or 574, 507 P2d 23 (1973), overruled on other grounds, Neuberger v. City of Portland, 288 Or 585, 607 P2d 722 (1980) (zoning decision as to a particular tract of land found quasi-judicial rather than legislative). Horn v. County of Ventura, 24 Cal 3d 605, 596 P2d 1134, 156 Cal Rptr 718 (1979) (subdivision approval found quasi-judicial and subject to procedural due process). Flemming v. City of Tacoma, 81 Wash 2d 202, 502 P2d 327 (1972) (amendments or reclassifications found adjudicatory in nature and subject to due process requirements, including the

the Court articulate the applicability

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appearance of fairness). Cooper v. Board of County Comm. of Ada County, 101 Idaho 407, 614 P2d 947 (1980) (rezoning found quasi-judicial and subject to procedural due process). Town v. Land Use Commission, 55 Hawaii 538, 524 P2d 84 (1974) (rezoning found quasi-judicial "contested case" subject to procedural safeguards of the Administrative Procedures Act). Kletschka v. LeSueur County Board of Comm., 277 NW2d 404 (Minn. 1979) (conditional use permit application found quasi-judicial and subject to due process notice and hearing requirements, but no right of cross-examination). Golden v. City of Overland Park, 224 Kan 591, 584 P2d 130 (1978) (rezoning found quasi-judicial subject to a reasonable standard of review). Kaelin v. City of Louisville, 643 SW2d 590 (1983) (rezoning found adjudicatory and notice and hearing with opportunity to cross-examine are required to meet due process). Geiger v. Levco Route 46 Associates, Ltd., 181 NJ Super. 278, 437 A2d 336 (1981) (site plan approval and variance application recognized as quasi-judicial and subject to procedural due process requirements). Winslow v. Town of Holderness Planning Board, 125 NH 262, 480 A2d 114 (1984) (subdivision decision found quasi-judicial and subject to due process, including notice and opportunity for a hearing before an unbiased tribunal). Capitol Hill Restoration Society v. Zoning Commission, 287 A2d 101 (D.C. 1972) (application for approval of planned unit development is adjudicatory in nature and entitled to Administrative Procedures Act protection as a contested case). Snyder v. City of Lakewood, 189 Colo 421, 542 P2d 371 (1975), overruled on other grounds, Margolis v. District Court, 638 P2d

and meaning of due process procedural requirements with respect to municipal land use decisions.

The absence of decisions from this Court on this point may lead state courts to assume, as the Oregon Supreme Court did, that this Court believes 14th Amendment procedural protections have but meager application to municipal decisions affecting the use of real property.

This Court could rule in this

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297 (Colo. 1981) (rezoning found quasi-judicial for purposes of judicial review). Harris v. Goff, 151 So.2d 642 (Fla. 1963) (rezoning found legislative, but court acknowledges that quasi-judicial actions by the board require due process safeguards). Alabama Farm Bureau Mutual Casualty Ins. v. Bd. of Adjustment, 470 So.2d 1234 (Ala. 1985) (granting of a variance is a quasi-judicial function). Foreman v. Eagle Thrifty Drugs and Markets, Inc., 89 Nev 533, 516 P2d 1234 (1973) (proceeding becomesd quasi-judicial where statute requires notice and hearing). Lowe v. City of Missoula, 165 Mont. 38, 525 P2d 551 (1974) (acknowledges that rezoning or granting of variances are quasi-judicial in nature). Wilson v. Manning, 657 P2d 251 (Utah 1982) (recognizes original enactment of zoning ordinance as legislative, but finding subsequent exceptions and variances merely "administrative.")

case that due process applies to adjudications-in-fact, regardless of state characterization, as Justices Stevens and Brennan have urged in Eastlake. 462 U.S. at 680.[11] Alternatively, this Court could defer to state characterization of municipal land use decisions as legislative or quasi-judicial, limiting due process applicability to municipal land use decision-making accordingly.

Either ruling would provide badly needed guidance regarding minimum standards of fairness to the municipal land use process.

2. The Oregon Supreme Court's interpretation of the 14th Amendment is inconsistent with Commonwealth.

While the Oregon Supreme Court applied the 14th Amendment to Wasco County's incorporation decision, it misinterpreted the 14th Amendment requirement of impartiality. The Oregon

11 This holding could exclude cases like Eastlake where reserved legislative powers are at issue.

Court of Appeals held that:

> the county's action was quasi-judicial, that petitioners were among those who had a due process right to an impartial decisionmaker and that Cantrell's financial involvement with those seeking incorporation disqualified him from participating in the vote, at least in the absence of a full public disclosure of his dealings. We therefore hold that the county's action in setting a date for the incorporation election was invalid. (emphasis supplied) 80 Or App 523, 535-536 (1986) (App C., A-45).

The Oregon Supreme Court reversed, holding that without a finding of "actual bias" or that "Cantrell gained" by voting to approve the land use application, federal due process does not invalidate such a local land use decision. The Oregon Supreme Court criticized the lower Court's holding saying it:

> pushes general propositions from cases involving courts, administrative adjudications and arbitrations further than we think the United States Supreme Court would go in a decision of this kind. (App. A, A-35). (emphasis supplied)

However, in Commonwealth Corp. v.

Casualty Company, 393 U.S. 145 (1968) this Court's invalidation of a unanimous arbitration award turned not on a showing of "actual bias" but solely on the failure of the neutral arbitrator to disclose a sporadic (last dealings were twelve months prior to the arbitration), but significant ($12,000 over five years), business relationship between the neutral arbitrator and one of the parties to the arbitration. Indeed, the party attacking the arbitration award conceded, and the Courts below held, "the third arbitrator was innocent of any actual partiality, bias or improper motive." 393 U.S. at 152.

The Oregon Supreme Court is correct that this Court has invalidated adjudicatory-type decisions where the decisionmaker had a stake in the outcome Tumey v. Ohio, 273 U.S. 510, (1927) and Gibson v. Berryhill, 411 U.S. 564 (1973).

However, this Court's ruling in Commonwealth did not depend on the question of whether an adjudicator had a personal interest at stake in the outcome. Indeed, this Court said in Commonwealth the interest the judge in Tumey had in the outcome of the matter before him was "too small a distinction" to control the holding of Commonwealth, 393 US at 148. There was no showing that the arbitrator in Commonwealth had a "personal stake" in the outcome of the arbitration. Yet the arbitration award was invalidated for the failure to disclose a prior (not pending) business relationship with one of the parties to the arbitration.

The Oregon Supreme Court distinguished Commonwealth because the neutral arbitrator had performed services on the projects involved in the dispute, whereas, in this case, while Cantrell was selling cattle to the ranch, and the

incorporation of the same ranch was the matter before Cantrell as adjudicator, Cantrell had no undisclosed business relationship with the land use applicants with respect to the incorporation itself. (App A., A-32).

Petitioners submit that the facts in this case far outweigh this factual distinction noted by the Oregon Supreme Court and demonstrate a more compelling need for constitutionally mandated disclosure than did the facts in Commonwealth.

In Commonwealth, unlike Wasco County, there was no suggestion (1) that the arbitrator was owed money at the time of the arbitration by one of the parties to the arbitration, (2) that the arbitrator with the prior business relationship with one of the parties to the arbitration needed cash immediately and that the party to the arbitration had knowledge of that

fact, (3) that the arbitrator had been overpaid by the party to the arbitration, (4) that one of the parties to the arbitration intended to engage in business with the arbitrator as a means of currying favor with the arbitrator and (5) that either the arbitrator or the party to the arbitration lied about or otherwise actively concealed the existence of the business relationship.

Without reversing prior rulings in this case that Wasco County's approval of the petition to incorporate 2,135 acres was "quasi-judicial," and without questioning that resolution of disputed factual issues was essential to that decision, the Oregon Supreme Court pointed to two circumstances which it said make such decisionmaking more "quasi" than "judicial."

> Their members are politically elected to positions that do not separate legislative from executive and judicial powers on the state or federal model; characteristically

> they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policy-making role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure. Also, the members of most governing bodies in this state serve part-time and without pay, making their living from the ordinary pursuits and private transactions of their communities. Restrictions on permissible business activities and sources of outside income imposed on judges for the sake of appearance do not apply by analogy to such board members. (App. A, A-19-20)

Whatever significance these comments might otherwise have, petitioners reject any implication of the comments that the 14th Amendment should not apply to the facts of this case.

First, no one in this case has suggested that a county commissioner with a strongly held policy view should pretend not to hold such a view when functioning in an adjudicative role. This is an

irrelevant strawman. There were few, if any, policy issues before the Wasco County Court about which any member of the Court was perceived by the public or parties to have any particularly strong view. The issues before the Court were primarily factual. The County Court's factfinding duties were no less extensive, less delicate, or less in need of impartiality than the determinations required of the arbitrators in Commonwealth, which involved whether a prime contractor owed money to a subcontractor for a paint job.

Second, applying due process to the type of governmental decision in this case would not restrict permissible business activities or sources of outside income for county commissioners in the way the Canons of judicial ethics restrain outside income for judges.

Commonwealth does not automatically restrain business activities by part-time,

non-court adjudicators. This Court simply insisted that when such relationships exist between a decisionmaker and a party before him/her, that the relationship be disclosed:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases. * * * We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. (393 U.S. 149) (emphasis supplied)

Justice White wrote a concurring opinion joined by Justice Marshall which amplified Justice Black's majority opinion on the point quoted directly above:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. * * * But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. 393 U.S. 150. (emphasis supplied)

The Oregon Supreme Court also refers to "ordinary pursuits." Cantrell's specialty was selling a side or a quarter of beef to a local buyer for locker beef, not 48 head in one transaction. D. Cantrell 163 D. Hunt, [Ex. 4, 5] Nor was the transaction "ordinary" given Cantrell's need for cash in summer/fall 1981, and the above market sale price.

The Oregon Supreme Court also argued that the arbitrators in Commonwealth were "more 'judicial' and less 'quasi'" than the Wasco County Court in this case because Justice Black used judicial examples (a jury foreman with an undisclosed business reltionship) or terminology ("in the case of courts" and "tribunal permitted by law to try cases and controversies") in applying a duty to disclose in Commonwealth. (App. A, A-32-34)

The Court's argument in this regard was not based on a comparison of the fact-finding functions of the arbitrators in Commonwealth or the Wasco County Court in this case.

The Oregon Supreme Court's references to Justice Black's opinion are unpersuasive. Justice Black used the phrase "in the case of courts" not to suggest that disclosure should be limited to purely judicial decision-making, but in connection with his conclusion that the duty to disclose was constitutionally based and that the same duty should be read into statutes governing arbitration proceedings. 393 U.S. at 148. A full quotation of the second judicial phrase Justice Black used to extend a duty of disclosure to arbitrators is

> any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. 393 U.S. at 150. (language not set forth in opinion below is underscored)

The prejudice to petitioners' position shows the inappropriateness of an "actual bias" test in circumstances where there has been no public disclosure.

The lack of disclosure at the November 4, 1981 public hearing prevented the making of a contemporaneous record on the issue of impartiality based on the best available evidence. The cattle, for example, could have been inspected and videotaped, on the spot, in Cantrell's pasture, and related to bills of sale.

Instead, discovery was not authorized until October 10, 1985, nearly four years after the transaction in question. At that time petitioners' ability to obtain evidence about, e.g. the number, weight, quality and condition of the cattle was severely impaired. Documents were either destroyed or lost. Memories of witnesses finally able to be deposed had faded. The cattle had long since been turned into

hamburger.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

Henry R. Richmond, III

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of Oregon Land Use Project, Inc., an Oregon nonprofit corporation, KELLY McGREER, ROSEMARY McGREER, JAMES G. PERKINS, SHIRLEE PERKINS, DAVID DICKSON and MELINDA DICKSON,	)	
Petitioners,	)	LUBA No. 81-132
vs.	)	
WASCO COUNTY COURT,	)	
Respondents.	)	FINAL OPINION AND ORDER
and	)	
DAVID KNAPP, RICHARD DENNIS SMITH, KEITH BULLOCK, SAMADHI MATTHEWS and CHIDVALIS RAJNEESH MEDITATION CENTER,	)	
Respondents-Participants.	)	

* * *

BAGG, Board Member
Remanded 09/30/83

* * *

The Board finds Kelly McGreer and Rosemary McGreer have standing to bring this appeal. They have alleged the city threatens their water supply and, consequently, their welfare and economic livelihood. In support of this claim, the McGreers submitted an affidavit in which they claim the area in which they live has a limited water supply. They allege a demand for groundwater by "thousands of people in Rajneeshpuram" could cause their wells to run dry. As a result, they would lose water for drinking and their stock. The Board believes these facts and this claim of injury is sufficient to show adverse effect and aggrievements (p. 7).

* * *

The Board finds James Perkins and Shirlee Perkins have standing to bring

this appeal. The Perkins have alleged traffic increases as a result of the activities at Rajneeshpuram, and the increased traffic threatens their stock which use the roadway. The Board understands the Perkins to claim that their stock are "driven on these roads and will be endangered" by the traffic. Affidavit of James G. Perkins and Shirlee D. Perkins attached to Petition for Review, Item 17, Page 102. The Board believes the claim of threat to livestock as a result of increased population at Rajneeshpuram and resultant increased traffic satisfies the requirements for standing in 1979 Or Laws, ch 772, section 4(3)(b), as amended by 1981 Or Laws, ch 748. [footnote deleted]

Petitioners David and Melinda Dickson have standing to bring this appeal. They allege their ranch is 15 miles from the Big Muddy Ranch, but the road to the

ranch passes their property. Petitioners Dicksons' claim increased traffic occasioned by growth from the city will cause additional traffic on the road endangering their children and livestock. The Board believes this claim is sufficient for standing under 1979 Or Laws, ch 772, section 4(3)(b)(5). [footnote deleted]

FACTS

The petition for incorporation was filed on October 15, 1981. The area proposed to be incorporated is about 20 miles east of Antelope, Oregon, on approximately 2135 acres. This property lies within land known as the Big Muddy Ranch. The area to be incorporated consists of about 61 percent Class VII and VIII soil, 35 percent Class VI soil and 4 percent Class II-IV soil. Agricultural activity occurred on this land in the past, but the property had been over

grazed. Record 10, 17, 20-22, 38-41, 43.

The Wasco County Court held the petition for incorporation on November 4, 1981. There was testimony both for and against the incorporation. At the close of the hearing, the county court adopted findings of fact and conclusions of law approving the petition. Record 1-45, 103.(pp. 7-9)

* * *

FOURTH ASSIGNMENT OF ERROR

> "The County Court Improperly Concluded that Goal 3 is Inapplicable in this Proceeding."

Under this assignment of error, petitioners say the county court failed to consider whether the soils on the 64,000 acre Big Muddy Ranch were SCS Class I-VI. Petitioners say the county court only considered soils on 2,135 acres prior to making its conclusion that Goal 3 did not apply because the predominate soil type

within the 2,135 acres was not within SCS Class I-VI. Petitioners further complain the county's finding that the property is not suitable for farm use is not supported by substantial evidence. Petitioners assert the record shows the land would support grazing if reclaimed for that purpose. Petition for Review 19-20, Item 17, Page 76-77. (p.10)

* * *

The record does not reveal an exception to Goal 14 was taken, as required under the new rule. The Board notes Wasco County made extensive findings on the matter of compliance with statewide planning goals when it approved the petition for incorporation (pp. 14-15).

* * *

SIXTH ASSIGNMENT OF ERROR

> "The County Court's Order is Invalid Because Petitioners Were Denied an Impartial Tribunal. Judge Cantrell's Failure to Disclose Ex Parte Contacts

and Conflicts of Interest, and His Failure to Withdraw from this Proceeding, Violated Fasano Safeguards and 14th Amendment Due Process Requirements." Item 17, p. 80.

Both petitioners and respondents agree this assignment of error would be rendered moot if the Board were to remand or reverse the decision of the Wasco County Court. County Judge Cantrell is no longer a member of the county court. Therefore, the Board does not reach this assignment of error. (p.20)

* * *

87-1557

No. .....

In the Supreme Court

of the United States

OCTOBER TERM, 1987

1000 FRIENDS OF OREGON,
the assumed name of Oregon Land Use Project, Inc.,
an Oregon non-profit corporation,
KELLY McGREER, ROSEMARY McGREER,
JAMES G. PERKINS, SHIRLEE PERKINS,
DAVID DICKSON and MELINDA DICKSON,

Petitioners,

v.

WASCO COUNTY COURT, DAVID KNAPP,
RICHARD DENNIS SMITH,
KENT BULLOCK, SAMADHI MATTHEWS,

Respondents,

CITY OF RAJNEESHPURAM and
RAJNEESH FOUNDATION INTERNATIONAL,
formerly
CHIDVILAS RAJNEESH MEDITATION CENTER,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

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Appendix A

IN THE SUPREME COURT
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of Oregon Land Use Project, Inc., an Oregon non-profit corporation, KELLY MCGREER, ROSEMARY MCGREER, JAMES G. PERKINS, SHIRLEE PERKINS, DAVID DICKSON and MELINDA DICKSON,
Respondents on Review,

v.

WASCO COUNTY COURT, DAVID KNAPP, RICHARD DENNIS SMITH, KENT BULLOCK, SAMADHI MATTHEWS,
Respondents (below),

CITY OF RAJNEESHPURAM and RAJNEESH FOUNDATION INTERNATIONAL, formerly CHIDVILAS RAJNEESH MEDITATION CENTER,

Petitioners on Review.

(LUBA 81-132; CA A39509; SC S33322)

In Banc

On Review from the Court of Appeals.*

Argued and submitted January 21, 1987.

* Judicial Review from Land Use Board of Appeals. 80 Or App 532, 723 P2d 1034 (1986).

Allen L. Johnson of Johnson & Kloos, Eugene, argued the cause for Petitioners on Review. With him on the petition were Edward J. Sullivan of Mitchell, Lang & Smith, Portland, and Leslie Roberts of Josselson, Potter & Roberts, Portland.

Kenneth M. Novack of Ball, Janik & Novack, Portland, argued the cause and filed a response for Respondents on Review. With him on the response was Robert E. Stacey, Jr., Portland.

LINDE, J.

The decision of the Court of Appeals is reversed, and LUBA's order is affirmed.

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Case Name: 1000 Friends v. Wasco County Court

Appellate case number: CA A39509; IS S33322

Trail Court or agency case number: LUBA 81-132

Prevailing party or parties: Petitioners on Review

[XX] No costs awarded

[ ] Costs awarded to the prevailing party or parties, payable by:

* * * * * * * * * * * * * * * * * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

---

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the

appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). See also ORS 19.190(1).

costs and disbursements taxed at $_____, and attorney fees in the amount of $_____. (ORAP 11.03, 11.05, and 11.10).

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $_____ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

DATED: SUPREME COURT

(seal)

LINDE, J.

The issue before us is whether a 2-1 decision by a board of county commissioners to call an election on a proposal to incorporate a city was invalid because one of the favorable votes was cast by a member who had undisclosed business dealings with proponents of the incorporation. The Land Use Board of Appeals (LUBA), after taking evidence on the transactions, rejected this challenge to the county board's action. On review, the Court of Appeals reversed LUBA's order and invalidated the county board's decision because one of the participants was not impartial. 1000 Friends of Oregon v. Wasco Co. Court, 80 Or App 532, 723 P2d 1034 (1986). We reverse the Court of Appeals and affirm LUBA's order.

The participation of the county board member, Wasco County Judge Richard Cantrell, in the vote was one of several

grounds on which 1000 Friends of Oregon objected to the incorporation of the City of Rajneeshpuram on what had been a ranch. A number of other objections under the land use laws were reviewed in prior decisions.[1] In the last of these decisions, this court remanded the present issue to LUBA with instructions to determine whether the incorporation election was invalid on grounds that the county judge improperly participated in setting the election, with prejudice to substantial rights. 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 376, 703 P2d 207 (1985). The issue was carefully considered on remand and well briefed by the parties, resulting in the

1 See 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 703 P2d 207 (1983); 1000 Friends of Oregon v. Wasco County Court, 68 Or App 765, 686 P2d 375 (1984), modified 299 Or 344, 703 P2d 207 (1984); 1000 Friends of Oregon v. Wasco County Court, 67 Or App 418, 679 P2d 320, withdrawn on rehearing in banc, 68 Or App 765, 686 P2d 375 (1984); 1000 Friends of Oregon v. Wasco Co. Court, 62 Or App 75, 659 P2d 1001, rev den 295 Or 259 (1983).

opposing conclusions stated by LUBA, over a dissent, and by the Court of Appeals.

LUBA's findings of fact may be summarized as follows. On two occasions when Cantrell visited the ranch, representatives of its residents, the petitioners for incorporation, told him that they were interested in buying cattle. Cantrell by letter offered to sell cattle to the ranch, asking prices somewhat higher than the prevailing market prices. He told his fellow commissioners of the intended sale but did not make it public. The representatives of the ranch accepted Cantrell's offer at his asking price. They decided to do so because they "needed him," and they consciously kept the transaction "low key" in order not to embarrass Cantrell. They also overlooked certain irregularities in the quality, weighing and transportation of the cattle, which LUBA found to have no significance

for its decision. LUBA concluded:

> "In sum, the evidence is that the sale was irregular in some respects. Overall, the sale reflects an eager buyer i.e., one who was less concerned with obtaining the best bargain possible than with meeting the requirements of the seller. The buyers and their associates may have believed this transaction would improve their chances of favorable treatment concerning the incorporation and related proceedings. There is no proof, however, that the transaction was expressly contingent on Cantrell's vote of November 4, 1981. Indeed, the evidence does not show any discussion at all between Cantrell and the cattle purchasers about the incorporation petition then pending before the county. Nor do we find that the transaction was so one-sided as to constitute a sham or an implicit 'pay-off' for his vote. Thus, we conclude petitioners have not carried the burden of proving disqualifying bias."

LUBA also considered whether the county board's decision was tainted by Cantrell's failure publicly to disclose his private dealings with the proponents of the incorporation. The majority

opinion observed that the facts did not meet Oregon's statutory definition of a "potential conflict of interest," ORS 244.020(4), because the effect of the incorporation decision would not be to Cantrell's private benefit or detriment, and in any event, the government ethics law expressly provides that an official's failure to disclose a potential conflict of interest shall not lead to invalidating the official's action by a "court." ORS 244.130(2). That term does not necessarily preclude reversal by higher or subsequent agency action; however, the LUBA majority found no legal basis to set aside Cantrell's vote, and therefore the county board's decision, on grounds of his undisclosed communications with the proponents concerning matters that did not bear on the proposed incorporation vote.

Chief Referee Kressel, dissenting, did not expressly disagree with the

majority's findings of fact. He concluded, however, that the proponents had attempted to gain Cantrell's support by economic pressure, and that the cattle deal was sufficiently likely to have influenced his vote to require Cantrell's disqualification under Oregon law and the due process requirement of the federal constitution.

In reversing LUBA's affirmance of the county board's action, the Court of Appeals held that LUBA's findings of fact were supported by substantial evidence. Implicitly exercising judicial review for procedural error, ORS 197.850(9)(a), as our remand directed, the court held the action was "quasi-judicial" under the criteria of Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 601 P2d 769 (1979), and therefore required decision by impartial board members under Fasano v. Washington Co. Comm., 264 Or

574, 507 P2d 23 (1973), and Commonwealth Corp. v. Casualty Co., 393 US 145, 89 S Ct 337, 21 L Ed 2d 301 (1968), both of which the court believed to be based on federal due process requirements.

Concerning the first premise, LUBA found that the local district attorney advised the county commissioners that they had no legal authority to deny a proper petition for an incorporation election, though they could alter the proposed boundaries, and that Judge Cantrell believed that he had no choice but to vote for an election. (Cantrell's title as county "judge" has no bearing on the nature of the board's decision; see generally Strawberry Hill 4 Wheelers, supra, 287 Or at 594-602 (discussing history and operation of county "courts").) Without pursuing the question here, we shall accept the assumption that a county board's decision on a petition

for an election to incorporate a city is "quasi-judicial," because we agree with the LUBA majority that even so, the decision need not be set aside on the facts found by LUBA.

OREGON LAW

We reach constitutional issues only after determining whether a case can be decided on other legal grounds, because a constitutional holding places the issue beyond the ordinary lawmaking process. See, e.g., Planned Parenthood Assn. v. Dept. of Human Res., 297 Or 562, 564-65, 687 P2d 785 (1984) and cases there cited. Fasano v. Washington Co. Comm., supra, the first case on which the Court of Appeals relied, did not cite the 14th amendment or Supreme Court doctrines interpreting "due process of law." As explained in a later decision written by the author of Fasano, that holding rested on legislation which

required county zoning to conform with a comprehensive plan, thus making certain types of zoning decisions dependent on "fact finding and the application of general policy as embodied in the comprehensive plan to a discrete [sic] situation * * *." Those decisions, were, therefore, "quasi-judicial rather than legislative in nature." Neuberger v. City of Portland, 288 Or 155, 159-60, 603 P2d 771 (1979). This legislative scheme "implied" certain safeguards characteristic of adjudicative procedure. See id. at 161; Strawberry Hill 4 Wheelers, 287 Or at 603.

The main holding in Fasano itself concerned burdens of proof and the scope of judicial review of local zone changes. See 264 Or at 586-88. The court considered it appropriate to add some procedural guidance for future cases, specifically that parties at county board

hearings "are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter--i.e., having had no pre-hearing or ex parte contacts concerning the question at issue--and to a record made and adequate findings executed." Fasano, 264 Or at 588 (citation omitted).

In using "i.e." in the quoted sentence, Fasano did not mean to imply that only pre-hearing or ex parte contacts could destroy the required impartiality; obviously, selfdealing and various types of bias also would do so. But Fasano did clearly state that board members must maintain impartiality only toward the parties and issues "in the matter," not toward all individuals and all competing interests in the community generally, and similarly, that the disqualifying contacts

must be "concerning the question at issue." The "matter" and the "question at issue" here concerned the proposal to incorporate Rajneeshpuram. LUBA concluded from the evidence that the proponents may have been eager to make a cattle deal with the county judge, but that alone does not make their dealings with Cantrell a disqualifying contact.

The Court of Appeals first quoted from Commonwealth Corp. v. Casualty Co., supra, that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias," 393 US at 150, quoted in 80 Or App at 539, and the court continued: "Cantrell should have disclosed
his dealings with the ranch officials, and, having failed to do so, was disqualified to sit on the petition for the incorporation election." 80 Or App

at 539. This leaves unclear whether the Court of Appeals thought that nondisclosure of facts, but not disclosure of facts, produces an "appearance of bias." In any event, Fasano did not go beyond a standard of actual impartiality to demand that board members in quasijudicial procedures maintain the appearance of impartiality required of judges.[2] The prefix "quasi," we recently

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2 Oregon Supreme Court, Code of Judicial Conduct, Canon 2 provides:

> "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
>
> "A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartially of the judiciary.
>
> "B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness."

Canon 3 provides, in part:

said in another context, "means that a thing is treated as if it were something it resembles but is not." State ex rel Eckles v. Wooley, 302 Or 37, 45, 726 P2d 918 (1986). The quasijudicial decisions of local general-purpose governing bodies resemble, or should resemble, adjudications in important respects

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C. Disqualification

> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> "(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> "* * * * *
>
> "(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subjects matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding * * *."

that bear on the procedural fairness and substantive correctness of the decision, but in other respects these bodies remain more "quasi" than judicial. Their members are politically elected to positions that do not separate legislative from executive and judicial power on the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure. Also, the members of most governing bodies in this state serve part-time and without pay, making their livings from the ordinary pursuits and private transactions of their

communities. Restrictions on permissible business activities and sources of outside income imposed on judges for the sake of appearance do not apply by analogy to such board members.

The distinction between two types of "bias," prejudgment and personal interest, is illustrated by McNamara v. Borough of Saddle River, 60 NJ Super 367, 158 A2d 722 (1960). There neighboring residents had fought the conversion of a large residential property into a private school, obtaining enactment of a restrictive ordinance and joining in litigation to enforce the restriction. One of the leaders of the protesting homeowners was elected to the borough council, where he voted to impose space requirements on schools that would further restrict possible enrollment of a school at the disputed site. The New Jersey court held that the councilman's vote

required invalidation of this ordinance, not because of his prior political and legal battles to block the proposed school, but because his strong personal interest as a nearby homeowner impaired his ability to vote objectively "in the interest of the citizens at large." 60 NJ Super at 378.

However we might decide that case, it involved an actual, not an apparent, personal interest. That, in fact, may also be true of the vote invalidated in Swift v. Island County, 87 Wash 2d 348, 552 P2d 175 (1976), in which an officer of a lending institution participated as a county commissioner in approving development that could indirectly benefit his company. The Washington court, however, went beyond the commissioner's actual interest and set aside the vote of approval for "lacking an 'appearance of fairness.'" 87 Wash 2d at 361. The court

continued:

> "This doctrine has been developed to preserve the highest public confidence in those governmental processes which bring about zoning changes or which formulate property use and land planning measures. * * * It is the possible range of mental impressions made upon the public's mind, rather than the intent of the acting governmental employee, that matters. The question to be asked is this: Would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? If answered in the affirmative, such deliberations, and any course of conduct reached thereon, should be voided."

Id. (citations omitted). There also are dicta about "public confidence" as a reason for disqualifying members of zoning boards in Mills v. Town Plan & Zoning Commission, 144 Conn 493, 134 A2d 250 (1957), in which the court cited nothing beyond "public policy" for this and the decision rested on actual conflicts of interest, and in Fail v. LaPorte Cty. Board of Zoning

Appeals, 171 Ind App 192, 355 NE2d 455 (1976), in which a statute disqualifed [sic] board members "directly or indirectly interested in a financial sense" and the decision was against disqualifying a member who had occasionally bought equipment from the applicant for a zoning variance. We find no basis in Oregon law for imposing the test of "appearance" stated by the Washington court in Swift.

We do not minimize the value of evident as well as actual objectivity and disinterestedness in governmental decisions. Its importance is recognized in the government ethics law, ORS chapter 244, and elsewhere. Lawmakers have chosen to promote confidence in official probity by means of periodic disclosure of specified economic interests by state officials. ORS 244.050 to 244.110. The requirement extends to local officials if

local voters so choose. ORS 244.160 to 244.201. The law also requires public officials to announce potential conflicts of interest before acting in the matter involving the potential conflict. ORS 244.120 to 244.130. Beyond these disclosure requirements, ORS 244.040 proscribes the actual use of an official's position or office to obtain financial gain for the public official or for closely associated persons. See Davidson v. Oregon Government Ethics Comm., 300 Or 415, 712 P2d 87 (1985). The Oregon Government Ethics Commission is responsible for enforcing the statute against officials, as it did in Davidson, but the statute does not prescribe the effect of a violation on the official's action. ORS 244.350 to 244.390.

If actual bias or self-interest will invalidate an official's action, at least quasijudicial action, a prophylactic

rule invalidating action for "lacking an 'appearance of fairness,'" Swift v. Island County, supra, may seem merely a desirable further step toward the same goal. That is not necessarily so. Of course, a reviewing body may find it less painful to order reconsideration of an official's action for insufficient respect for appearances than to determine whether the official in fact acted under the influence of bias or self-interest. But the two standards serve different interests. Actual impartiality protects the substantive quality of the official action as well as the parties' interest in its fairness. Invalidation for appearance alone, as the Swift court said, aims to preserve public confidence, and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application

of public policy, at potentially heavy cost to an innocently successful proponent as well as to the agency.

Public confidence in judicial institutions is given such priority over efficiency even in a fairly and correctly decided case.[3] Even for decisions of elected boards that, as we have said, are more "quasi" than judicial, this priority for public confidence may be the desirable choice. But it is not a choice for this court to impose in the name of public

---

3 Standards for disqualification of judges are set forth in several places. 28 USC section 455, which applies to federal judges, provides in part: "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The Code of Judicial Conduct of the American Bar Association, Canon 3(c), is identical to Oregon's Canon 3(C), supra note 2. Notice that Canon 3(c) is not by its terms limited to a judge's adjudicative acts.

For an extensive discussion of this statute and canon, see 13 A Wright, Miller & Cooper, Federal Practice & Procedure sections 3541, 3549; see also sources cited id. at section 3541, 548-49 n 1.

policy. The contrary choice of policy toward appearances alone is implied by the provision in Oregon's governmental ethics law against invalidating actions for failure to disclose a potential conflict of interest, ORS 244.130(2).

DUE PROCESS

The Court of Appeals believed that Cantrell's participation tainted the county board's vote on the incorporation petition for failure to meet federal standards of due process under the 14th amendment. The court dealt with a preliminary question whether petitioners could make this claim by holding that they had a "property interest" (though not a conventional one) covered by Board of Regents v. Roth, 408 US 564, 92 S Ct 2701, 33 L Ed2d 548 (1972), in their state-granted right to ensure compliance with the land use laws. We are less

confident that the United States Supreme Court would so characterize petitioners' interest. But once petitioners qualified as "aggrieved" persons under ORS 197.830(2)(b) or 197.830(3)(c)(B) to invoke LUBA's review at all, this review could reach an institutional failure of due process toward anyone's "property interests," as long as petitioners' "substantial rights" were prejudiced thereby. ORS 197.835(8)(a)(B). We therefore consider the 14th amendment claim.

The Court of Appeals wrote that a "decision on the merits by an adjudicator with a personal interest in the outcome is a violation of due process," noting that this "rule applies to administrative as well as judicial adjudications." 80 Or App at 538. In support of these propositions, the court cited Ward v. Village of Monroeville, 409 US 57, 93 S Ct

Village of Monroeville, 409 US 57, 93 S Ct 80, 34 L Ed 2d 267 (1972); Tumey v. Ohio, 273 US 510, 47 S Ct 437, 71 L Ed 749 (1927); Gibson v. Berryhill, 411 US 564, 578-579, 93 S Ct 1689, 36 L Ed 2d 488 (1973); Withrow v. Larkin, 421 US 35, 95 S Ct 1456, 43 L Ed 2d 712 (1975); and Commonwealth Corp. v. Casualty Co., supra. The general proposition is unexceptionable, though it rather grandly passes over the key question what kind of interests are distinctively "personal" and how directly they must be at stake in the outcome.

In Tumey, which originated this line of cases, the personal interest was financial and immediate: The compensation of the adjudicating officer (a mayor) included the costs assessed against those defendants whom he found guilty. An equally direct financial gain from the fines of convicted offenders was involved

in Ward, with the significant difference that the income went to village operations for which the mayor was responsible rather than to himself. Also these cases involved classic adjudications, decisions that an individual had violated a law, there was nothing "quasi-judicial" about them.

Gibson v. Berryhill, supra, found a denial of due process when optometrists working for a corporate employer were penalized for "unprofessional conduct" by a state board of optometry composed of independent practitioners, who, according to the trial court's findings, would gain financially along with other private practitioners from driving the corporation out of business. 411 US at 571. The tribunal in Gibson was an administrative board applying a professional licensing law, but as in Tumey, the holding rested on the board members' personal financial

gains from the substance of the decision at issue. Id. at 579. Withrow v. Larkin, cited with "see also" by the Court of Appeals, concerned disqualification of medical board members for alleged bias and prejudgment rather than for self-interest, and the Supreme Court saw no want of due process when members adjudicated a violation after conducting the preceding investigation.

Finally, the Court of Appeals considered the "case closest to this one on its facts" to be Commonwealth Corp. v. Casualty Co., supra, from which it quoted the proposition that "any tribunal permitted by law to try cases and controversies not only must be unbiasd but also must avoid even the appearance of bias." 393 US at 150, quoted in 80 Or App at 539. In Commonwealth Corp., the Supreme Court invalidated an arbitration of a contract dispute under the United

States Arbitration Act because the prevailing party earlier had employed the firm of the neutral member of the arbitration panel, who in fact had performed services on the projects involved in the dispute, and neither the prevailing party nor the arbitrator had disclosed this to the other party. We are not persuaded that the quoted generalization will stretch from that context to invalidate under the 14th amendment a county commissioner's vote under circumstances like the present.

Justice Black's opinion stated the issue to be "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." 393 US at 145. Referring to "the close financial relations that had existed

between [the arbitrator's firm and the prevailing party] for a period of years," the opinion expressed "no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge." Id. at 148. Disclosure of even a small financial interest was said to be required under the arbitration law because it is a constitutional principle "in the case of courts." Id. In short, the role of the arbitrators in Commonwealth Corp., or at least of the supposedly neutral member, was more "judicial" and less "quasi," more that of a "tribunal permitted by law to try cases and controversies" (a phrase drawn from the definition of federal judicial power under article III of the United States Constitution), than the role performed by the Wasco County

commissioners in deciding whether to approve an election on the petition to incorporate the City of Rajneeshpuram.

The cases do not easily yield a single, simple rule, but it seems that 14th amendment standards for disqualification tighten with three separate variables: first, the more the officer or agency purports to act as a court (Tumey, Ward); second, the closer the issues and interests at stake resemble those in traditional adjudications, (Commonwealth Corp.); and third, as the disqualifying element moves from appearances through possible temptation and generic self-interest (Gibson) to actual personal interest in the outcome of the decision (Tumey). In the present case each element is at the low end of the scale.

In sum, the disagreement between

the LUBA majority and the dissenting member was whether due process required Cantrell's disqualification because his sale of cattle to proponents of Rajneeshpuram on favorable terms was likely to have predisposed him to support their petition. Neither found that Cantrell gained anything from voting to submit the incorporation petition to an election. Without reaching any issue of disqualification for actual bias, the Court of Appeals held that Cantrell's failure to disclose his dealings with the proponents sufficed under the 14th amendment to disqualify him from voting. That holding pushes general propositions from cases involving courts, administrative adjudications and arbitrations further than we think the United States Supreme Court would go in a decision of this kind. As the factfinding agency, LUBA here found that Cantrell was

not disqualified by financial interest or actual bias in favor of the proponents. We agree with LUBA that there is no legal basis for invalidating the decision of the Wasco County commissioners.

The decision of the Court of Appeals is reversed, and LUBA's order is affirmed.

IN THE SUPREME COURT
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of Oregon Land Use Project, Inc., an Oregon non-profit corporation, KELLY McGREER, ROSEMARY McGREER, JAMES G. PERKINS, SHIRLEE PERKINS, DAVID DICKSON and MELINDA DICKSON.	)	ORDER DENYING RECONSIDERATION
Respondents on Review.	)	CA A39509
v.	)	SC S33322
WASCO COUNTY COURT, DAVID KNAPP, RICHARD DENNIS SMITH, KENT BULLOCK, SAMADHI MATTHEWS,	)	
Respondents (below),	)	
CITY OF RAJNEESHPURAM and RAJNEESH FOUNDATION INTERNATIONAL, formerly CHIDVILA RAJNEESH MEDITATION CENTER,	)	
Petitioners on Review.	)	

The Court has considered the petition

for reconsideration and ORDERS that it be denied.

DATED: November 24, 1987.

/s/Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Appendix C

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

1000 FRIENDS OF OREGON et al,
Petitioners - Cross-Respondents,

v.

WASCO COUNTY COURT et al,
Respondents,

CITY OF RAJNEESHPURAM et al,
Respondents - Cross-Petitioners.

(81-132; CA A39509)

Judicial Review from Land Use Board of Appeals.

Argued and submitted May 14, 1986.

Kenneth M. Novack, Portland, argued the cause for petitioners - cross-respondents. With him on the brief were Ball, Janik and Novack, Mark J. Greenfield and Robert E. Stacey, Jr., Portland.

Leslie M. Roberts, Portland, argued the cause for respondents David Knapp, Richard Dennis Smith, Kent Bullick and Samadhi Matthews, and respondents - cross-petitioners City of Rajneeshpuram and Rajneesh Foundation International, formerly Chidvalis Rajneesh Meditation Center. With her on the brief were Sullivan, Josselson, Roberts, Johnson & Kloos and Rex Armstrong, Portland.

No appearance for respondent Wasco County.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P.J.

Reversed and remanded on petition and on cross-petition.

WARDEN, P.J.

Petitioners seek review of an order in which the Land Use Board of Appeals (LUBA) held that certain undisclosed business dealings between Wasco County Judge Richard Cantrell[1] and those seeking to incorporate the City of Rajneeshpuram did not invalidate Cantrell's vote in favor of holding an election on a petition to incorporate the city. We reverse and remand.

This case is a companion to 1000 Friends of Oregon v. Wasco County Court, 80 Or App 525, ___ P2d ___ (No. A39453) and involves a different portion of the same LUBA order.[2] In 1000 Friends of

1 As the Wasco County Judge, Cantrell had certain limited judicial functions. See ORS 5.010-5.030. However, the primary function of the county court is the conduct of county business. See ORS 203.111.

2 Several respondents cross-petition for

Oregon v. Wasco County, 299 Or 344, 703 P2d 207 (1985) Wasco County IV),[3] the Supreme Court remanded the Rajneeshpuram incorporation issue to LUBA with instructions to consider "[w]hether the Wasco County judge acted improperly, with prejudice of substantial rights, rendering the Wasco County Court order invalid." 299 Or at 376. Pursuant to the remand, LUBA permitted the parties to conduct discovery and then held an evidentiary hearing. On the basis of that evidence, LUBA found the following facts.[4]

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review of the LUBA order, raising the same issues which they raised in 1000 Friends of Oregon v Wasco County Court, supra. We reverse and remanded on the cross-petition for the reasons stated in that case.

3 See 1000 Friends of Oregon v. Wasco County Court, supra, 80 Or App at ___ (slip opinion at 1), for a list of the previous appellate decisions concerning the incorporation of the City of Rajneeshpuram.

4 All of the relevant facts are supported by substantial evidence. We need not consider petitioners' assignments attacking LUBA's findings as inadequate, because the facts which LUBA did find are sufficient for our decision. In a few instances LUBA improperly stated that substantial evidence supported certain

Cantrell visited Rancho Rajneesh (the former Big Muddy Ranch) in August, 1981, together with other members of the Wasco and Jefferson County Courts.[5] At that time representatives of the ranch--who were also representatives of the petitioners for incorporation--told Cantrell that they were interested in buying cattle. In early October, Cantrell and his wife dined at the ranch, and one of its leaders again raised the subject of buying cattle. Cantrell recommended that they buy "hamburger grade" cattle, which happened to be what he had for sale. He thereafter told the two Wasco County commissioners that he intended to sell cattle to the ranch, but he did not

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findings rather than finding the facts in accordance with its view of the weight of the evidence. See ORS 197.830(11). That was only a mistake of terminology; it is clear from the order that LUBA in fact found in accordance with the evidence which it stated was substantial.

5 The ranch is located in both counties, although the proposed city was only in Wasco County.

publicly disclose his dealings before the county court acted on the incorporation petition. He formally proposed to sell cattle to the ranch in a letter dated October 13, 1981, after the county court had rejected the original incorporation petition as legally deficient. On October 14, representatives of the proposed city presented a corrected petition.

Rancho Rajneesh leaders were conscious of the effect Cantrell's sale of cattle might have on his vote on the incorporation petition. One of the leaders asked the ranch foreman to keep the sale low-key so as not to embarrass Cantrell. Ma Anand Sheela, one of the ranch leaders, told the foreman to pay Cantrell's asking price, because "we needed him." On October 22, Cantrell and ranch officials reached an agreement on the sale. On November 4, the county court approved the incorporation election by a

vote of two to one, Cantrell voting with the majority. On November 9, he delivered the cattle to the ranch's representatives.

LUBA found that Cantrell received more than the market price for the cattle, although it did not determine precisely how much more. It also found that the sale reflected an eager buyer, "one who was less concerned with obtaining the best bargain than with meeting the requirements of the seller." Although the buyers may have believed that the sale would improve their chances of favorable treatment on the incorporation petition, there is no proof that the sale was expressly contingent on Cantrell's vote. Neither was the transaction so one-sided that it was a sham or suggests a payoff. Because there was no direct connection between the sale and Cantrell's vote, LUBA held that he was not biased in a way that would invalidate his vote or the county's

action.

Petitioners, who opposed the incorporation of Rajneeshpuram at the county hearing on November 4, 1981, assert that LUBA erred in failing to hold that Cantrell's activities deprived them of their right to an impartial decision-maker at the hearing. We hold that the county's action was quasi-judicial, that petitioners were among those who had a due process right to an impartial decision-maker and that Cantrell's financial involvement with those seeking incorporation disqualified him from participating in the vote, at least in the absence of a full public disclosure of his dealings. We therefore hold that the county's action in setting a date for the incorporation election was invalid.

In Fasano v. Washington Co. Comm, 264 Or 574, 507 P2d 23 (1973), overruled in part on other grounds, Neuberger v. City

of Portland, 288 Or 585, 607 P2d 722 (1980), the Supreme Court held that a decision to change the zoning of a parcel of property was a quasi-judicial rather than a legislative act and that parties to the decision were entitled to various rights, including an impartial decision-maker. 264 Or at 588. Since Fasano the determination of which land use decisions are quasi-judicial has created some difficulty. Shortly after Fasano we held that a county's action on an incorporation petition was legislative rather than quasi-judicial. Millersburg Dev. Corp. v. Mullen, 14 Or App 614, 621-624, 514 P2d 367 (1973). However, that holding has been superseded by more recent Supreme Court cases and is no longer controlling.

In Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 601 P2d 769 (1979), the court described

a number of factors to consider in determining whether a county land use action is quasi-judicial.[6] "Generally, to characterize a process as an adjudication presupposes that the process is bound to result in a decision and that the decision is bound to apply preexisting criteria to concrete facts." 287 Or at 602. Other relevant factors are the importance of assuring that the decision is factually correct and that the decision-maker gives fair attention to affected individuals. The number of people affected and the size of the area covered area less important considerations. 287 Or at 603. That the decision-maker is applying the statewide planning goals to the decision is also

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6 The precise issue in Strawberry Hill 4 Wheelers was whether the county's action was reviewable by a writ of review. However, the criteria the court used in Strawberry Hill 4 Wheelers, to determine whether a land use decision is quasi-judicial and other criteria, which it suggested in that case might be helpful in other contexts, are appropriate guides for our determination in this case.

an indication that its action is adjudicative. See Neuberger v. City of Portland, 288 Or 155, 165-166, 603 P2d 771 (1979), rehearing den 288 Or 507, 607 P2d 722 (1980). In this case, once the proponents presented the petition for an incorporation election, the process was bound to result in a decision. That decision had to be based in large part on preexisting criteria in the state incorporation statutes and the land use goals. Applying the goals necessarily involved extensive fact finding. A quasi-judicial process is best adapted to that function. We hold that the county's action on the incorporation petition was quasi-judicial.

When the Supreme Court held, in Fasano v. Washington Co. Comm., supra, that a quasi-judicial tribunal must be impartial, it did not state the basis for its holding. Since Fasano, we have

recognized that its holding is based, at least in part, on the Due Process Clause of the Fourteenth Amendment. See, e.g. Turner v. Duris, PayLess Properties, 21 Or App 613, 628, 536 P2d 435 (1975). We therefore look to Fourteenth Amendment cases to determine petitioner's rights and Cantrell's responsibilities in this case.[7]

To be entitled to procedural due process under the Fourteenth Amendment--and that is what petitioners seek in attacking Cantrell's participation in the decision--one must have either a liberty or property interest at stake. Board of Regents v. Roth, 408 US 564, 571-572, 92 S Ct 2701, 33 L Ed 2d 548 (1972). Petitioners do not claim to have a liberty

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7 Under ORS 197.835(8)(a)(B), LUBA may reverse for a procedural failure only if petitioners show prejudice to their substantial rights--that is to their rights on the substantive issues involved. That the decision-maker was not impartial necessarily prejudices the rights of parties on the substance of the decision.

interest involved. Although they do not have a conventional property interest, the Fourteenth Amendment's protections are not limited to such interests alone. Rather, it protects "the security of interests that a person has already acquired in certain benefits. These interests--property interests--may take many forms." 408 US at 576. A person has a property interest in a benefit if a person has a legitimate claim of entitlement to it. The constitution is only infrequently the source of that legitimate claim; rather, it is usually found in other law--often state law--outside the constitution.

Petitioners' interest in the Rajneeshpuram incorporation issue is their interest in ensuring that the county comply with the state's land use laws. By statute, petitioners have standing to challenge the county's action if

it violates those laws. Their interest is therefore one to which they have a legitimate claim of entitlement under state law. It is thus a property interest to which the Due Process Clause applies. See ORS 197.830(3); Jefferson Landfill Comm. v. Marion Co., 297 Or 280, 282 n 1, 284, 686 P2d 310 (1984). The legislature has given them the same rights in the local government process as those of a person with a conventional, Fasano property interest. Because petitioners have a property interest in a proper decision they may assert that Cantrell's activities denied them the right to an impartial decision-maker. We turn to that issue.

The crucial question is whether those activities, and Cantrell's failure to disclose them publicly, so tainted his role that the county's decision cannot stand.[8] In Neuberger v. City of Portland,

8 Although the parties discuss the

supra, 288 Or at 589, the Supreme Court held that the Portland City Council was not improperly influenced by a proposal by a developer to sell lands to the city at the same time that it sought a zone change for the property. The developer first proposed the sale at an open hearing, and the mayor and staff members explained the status of the proposal at later hearings. There were no covert dealings, nor was any council member's personal interest involved. Neuberger is obviously distinguishable from this case. Further, United States Supreme Court opinions area controlling on Fourteenth Amendment due

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law concerning ex parte contacts at some length, LUBA correctly recognized that such contacts are not an issue in this. Ex parte contacts refer to extra-record discussions on facts in issue. There is no evidence that Cantrell and representatiaves [sic] of the ranch had such contacts. The issue, rather, is one of implied bias. In deciding it, we do not consider the suggestions in the record that ranch officials hoped that the cattle sale would make Cantrell favorably inclined to their position. LUBA did not find that Cantrell was aware of that hope or that he was influenced by it.

process, and we turn now to them.

A decision on the merits by an adjudicator with a personal interest in the outcome is a violation of due process. Ward v. Village of Monroeville, 409 US 57, 93 S Ct 80, 34 L Ed 2d 267 (1972); Tumey v. Ohio, 273 US 510, 47 S Ct 437, 71 L Ed 749 (1927). That rule applies to administrative as well as judicial adjudication. Gibson v. Berryhill, 411 US 564, 578-579, 93 S Ct 1689, 36 L Ed 2d 488 (1973); see also Withrow v. Larkin, 421 US 35, 47, 95 S Ct 1456, 43 L Ed 2d 712 (1975). The case closest to this one on its facts is Commonwealth Corp. v. Casualty Co., 393 US 145, 89 S Ct 337, 21 L Ed 2d 301 (1968). Although it involved section 10 of the United States Arbitration Act, 9 USC section 10, rather than the Due Process Clause of the Fourteenth Amendment, it is clear that the Supreme Court considered the standards to

be the same; it relied primarily on Tumey v. Ohio, supra, a due process case, in reaching its decision.

In Commonwealth Corp., the petitioner, a subcontractor, challenged an arbitration award on the ground that the prime contractor was a regular customer of the engineering consulting firm of one of the arbitrators. Although the prime contractor had not done business with the firm in question for about a year immediately before the arbitration, over a period of four or five years before the arbitration it had paid fees totalling $12,000, and the arbitrator had performed services on the projects involved in the arbitration. Although the prime contractor knew of the relationship, neither it nor the arbitrator disclosed it to the petitioner. In holding the arbitration void, the court emphasized the arbitrator's failure to disclose, which

had prevented the petitioner, if it had so desired, from objecting to his serving. The lack of evidence of actual misconduct was irrelevant. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 393 US at 150.

Cantrell should have disclosed his dealings with the ranch officials and, having failed to do so, was disqualified to sit on the petition for the incorporation election. Although we do not expect part-time local government officials--nor do we expect part-time arbitrators--to forego their normal business activities, when those activities include doing business with one of the parties who will be affected by a quasi-judicial decision, an official must disclose the business relationship to other affected parties. Because Cantrell

did not take even that step, we need not decide whether he could have participated after disclosure if petitioners had objected. Under the circumstances, his participation made the county's action void. LUBA erred by holding otherwise.[9]

Reversed and remanded on petition and on cross-petition.

We disagree. Even if an Ethics Commission determination that an individual has not violated the Act could ever affect a judicial determination of the validity of the official's public acts, it did not do so here. A decision not to pursue a complaint is not a decision on the merits after a full evidentiary hearing and has no effect on collateral litigation. In

9 Respondents argue that the decision of the Oregon Government Ethics Commission not to pursue a complaint against Cantrell for violation of the Government Ethics Act collaterally estops petitioners from asserting that his dealings invalidated his vote.

addition, the Commission has jurisdiction under the Government Ethics Act, not under the requirements of Fourteenth Amendment Due Process on which we base our decision. See also ORS 244.390 (penalties provided in the Ethics Act are in addition to and not in lieu of other applicable penalties).

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of Oregon Land Use Project, Inc., and Oregon non-profit corporation, KELLY MCGREER, ROSEMARY MCGREER, JAMES G. PERKINS, SHIRLEE PERKINS, DAVID DICKSON, and MELINDA DICKSON,	LUBA No. 81-132
Petitioners,	FINAL OPINION AND ORDER ON REMAND FROM SUPREME COURT
vs.	
WASCO COUNTY COURT,	
Respondent,	
and	
DAVID KNAPP, RICHARD DENNIS SMITH, KENT BULLOCK, SAMADHI MATTHEWS and CHIDVILAS RAJNEESH MEDITATION CENTER	
Respondents.	

Appeal from Wasco County Court.

Kenneth J. Novack and Mark J. Greenfield, Portland, filed briefs and argued on behalf of petitioners. With them on the briefs was Robert E. Stacey, Jr.

Wilford Carey, Hood River, filed a brief and argued on behalf of Respondent Wasco County Court.

Swami Premsukh, Rajneeshpurasm, and Allen Johnson, Eugene, filed briefs and argued for Respondent-Participant City of Rajneeshpuram and private respondents. Ma Prem Sangeet, Rajneeshpuram, filed briefs and argued on behalf of City of Rajneeshpuram.

BAGG, Referee; DUBAY, Referee, participated in the decision.

KRESSEL, Chief Referee, Dissenting.

REMANDED 03/14/86

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bagg.

NATURE OF THE DECISION AND PROCEDURAL HISTORY

Petitioners appeal a decision of the Wasco County Court approving a petition for incorporation and setting an election. The decision was issued on November 4, 1981 and was reviewed by this Board in 1000 Friends of Oregon v. Wasco County Court, 5 Or LUBA 133 (1982). An appeal to the Court of Appeals resulted in a remand to the Board in 1000 Friends of Oregon v. Wasco County Court, 62 Or App 75, 659 P2d 1001, rev den 295 Or 259 (1983). After further hearings, this Board issued a second opinion, 1000 Friends of Oregon v. Wasco County Court, ___ Or LUBA ___, (LUBA No. 81-132, September 30, 1983). This second decision was appealed and resulted in the present remand. 1000 Friends of Oregon v. Wasco County Court, 299 Or 344,

703 P2d 207 (1985).

The petition for review included six assignments of error. The assignments of error alleged (1) violations of several statewide planning goals, (2) procedural error, and (3) that the evidence was insufficient to support the county's decision.[1]

The Supreme Court disposed of all except two of petitioners' challenges. The court framed two issues on remand:

"(1) Whether the county court's Goal 3 suitability determination that the area proposed for incorporation is not suitable for farm use' is supported by substantial evidence in the whole record; and

"(2) Whether the Wasco County judge acted improperly, with prejudice of substantial rights, rendering the Wasco County Court order invalid?"[2]

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1 Specifically, the challenges were to Statewide Planning Goals 2, 3, and 14.

2 The issues as framed by the Supreme Court coincide with the Fourth and Sixth Assignments of Error in the original petition for review. The Fourth Assignment of Error stated:

"The County Court Improperly

1000 Friends v. Wasco County Court, 299 Or at 376.

Our review is therefore limited to these two issues.

AGRICULTURAL LANDS ISSUE

The county found the 2,135 acres to be incorporated consists predominantly of

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Concluded that Goal 3 is inapplicable in this proceeding." Petition for Review at 18.

The Sixth Assignment of Error stated:

> "The County Court's order is invalid because petitioners were denied an impartial tribunal. Judge Cantrell's failure to disclose ex parte contacts and conflicts of interest, and his failure to withdraw from this proceeding, violated Fasano safeguards and the Fourteenth Amendment Due Process Requirements." Petition for Review at 23.

Petitioners have moved to amend the Sixth Assignment of Error to add detail about the alleged impropriety of Cantrell's participation in the vote. The motion is denied. The Supreme Court has framed the issues for our review, and we believe the Court directed that our inquiry be sufficiently broad to include all matters relevant to the propriety of the county court's decision given Judge Cantrell's participation in it.

Class VII and VIII soils.[3] Approximately 35 percent of the land was found to be Class VI soil. A small percentage of the land was found to be Class II through IV soils. The county found that all Class II through IV soils would be preserved for agricultural production. Record 10.[4]

The county went on to find that the area proposed for incorporation was not suitable for farm use because (1) the predominant soil types were Class VII and VIII and (2) the bulk of the ranch has been "over-grazed and will not support grazing uses without extensive reformation and land management activities." Record

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3 United States Soil Conservation Service (SCS) Class I through IV (in western Oregon) and I through VI (in eastern Oregon) soils are presumed to be "agricultural lands" as provided by Statewide Planning Goal 3.

4 This finding was apparently based on the expressed intention of the incorporators. The finding states "The limited amount of Class II-IV soils included within the proposed boundary have been, and will continue to be, cultural and otherwise preserved for farm use." Record 11.

10-11. The county found the land to be inside the proposed city is not now in farm use and is not necessary "to the continuation of existing farm activities now undertaken on other portions of the ranch."[5] Record 11.

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5 These findings are sufficient to establish that the property is not "other lands which are suitable for farm use," and therefore, agricultural land within the meaning of Statewide Planning Goal 3. Additionally, the findings are adequate to show that the property does not fall within the definition of lands in other classes which may be needed to support farming activities on adjacent land. See the definition of agricultural land in Goal 3. We reject, as did the Supreme Court, petitioners' view that the entirety of the Big Muddy Ranch must be considered in deciding whether or not the particular area for incorporation is agricultural land and defined by Goal 3. Flurry v. Land Use Board, 50 Or App 263, 623 P2d 671 (1981). See also 1000 Friends of Oregon v. Wasco, 299 Or at 372.

If the findings are adequately supported by substantial evidence, we must affirm the county on the question of inapplicability of Statewide Planning Goal 3.

We note the Supreme Court found that while statewide land use planning goals apply to incorporation proceedings, the test for goal compliance is whether it is "reasonably likely that the newly incorporated city can and will comply with

In sum, the land does not fit the definition of agricultural land found in Statewide Planning Goal 3,[6] according to

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the goals...." 299 Or at 360. In this case, we can assume the county was aware of the city's intention to plan and zone the incorporated area for urban uses (with the exception of the SCS Class II and III soils which were to be saved for agricultural use). Because the incorporators apparently intended that urban uses would be placed on the land, the county was obliged to make findings on Goals 3 and 14.

6 Agricultural lands is defined in Goal 3 as:

> "Agricultural Land - in western Oregon is land of predominatly [sic] Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy input required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural lands in any event."

the county.

The Wasco County Soil and Water Conservation District filed a report with the county board stating the site has a high clay content. Record 227. This soil composition encourages "undesirable grasses as Medusa Head and Cheatgrass" which are competitive with native grasses. Id. The district considered reseedings but said it was "doubtful" that "small grain can be grown because of soil limitations (i.e., shallow, rocky, or clay-filled soils) and the Soil Classification Classes." Id.[7]

Petitioners dispute the county's conclusion about agricultural capability, pointing to evidence that the area has been used for agricultural purposes. Record 70, 73, 227. Petitioners claim

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7 The Oregon State Water Resources Board said the shallow soil types limit irrigability Exhibit 7, p. 28. See also the report of the Trout Creek-Shaniko Soil Survey (Exhibit 8) providing maps showing soil types in the area with notations on suitability for agricultural use.

this past agricultural use created a presumption that the property is presently suitable for agricultural activity. See Nemi v. Clatsop County, 6 Or LUBA 147 (1982).

In Nemi v. Clackamas County, 9 Or LUBA 152 (1983), this Board stated that land is not necessarily suitable for farm use simply because it could be reclaimed with extensive fertilization or other management techniques. Nemi, 9 Or LUBA at 160. This holding is consistent with Still v. Marion County, 5 Or LUBA 206 (1982) in which we rejected the argument that agricultural potential of a parcel of property automatically qualifies it as "other lands suitable for farm use" as defined in Goal 3.

[8] ***** WHERE DOES FOOTNOTE 8 BELONG??

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[8] We understand petitioners to read the county findings to say that the 61 percent of the total acreage composed of Class VII and VIII soils is not agricultural land simply because it does not meet the first definition of agricultural land containing

Our difficulty in this appeal is that the record does not detail how expensive or difficult reclamation of the land for agricultural use might be. The report of the Soil and Water Conservation District says reclamation would be "difficult." Testimony in the record echoes this

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Goal 3. Petitioners read the county order to ignore these soils from consideration as to whether the land is otherwise suitable for farm use notwithstanding its soil classification.

We disagree. While somewhat ambiguous, we understand the county to have examined all of the soil for suitability for farm use notwithstanding its soil classification. The order discusses soils and the suitability of the "area" for farm use. The following is illustrative of the county's consideration of the whole property:

> "Since at least 61 percent of the area proposed for incorporation is comprised of Class VII and VIII soils, which are otherwise unsuitable for farm uses, the lands in question are not predominantly agricultural lands as defined by Goal 3. Furthermore, these nonfarm lands are not now in farm use. Overgrazing and the slope and fertility limitations of the lesser amount of Class VI soils render these lands unsuitable for agricultural use as well." Record 11.

conclusion, as do the county's findings. However, there is nothing against which to measure the difficulty. The county does not say that reclamation efforts would require more in resources than can reasonably be expected to be returned from the land if reclamation is successful. See Nemi, 9 Or LUBA, supra. The county does not cite us to any evidence in the record which might shed light on the severity of this difficulty.

The record lacks evidence (and findings) explaining how the difficulty in reclaiming the land for agricultural use precludes the reclamation effort. Therefore, we find the county's conclusion that the property is not suitable for farm use is not substantiated. City of Roseburg v. Roseburg City Firefighters, 292 Or 266, 639 P2d 90 (1981).

WHETHER THE WASCO COUNTY JUDGE ACTED

IMPROPERLY

Former Wasco County Judge Richard Cantrell sold cattle to representatives of Rancho Rajneesh prior to the hearing on the petition for incorporation. The transaction was not publicly disclosed. Cantrell's vote to approve the petition was crucial to the county's 2-1 decision in favor of the petition. The questions on remand are whether Cantrell's action was improper, resulted in prejudice to petitioners' substantial rights, and requires invalidation of the county's decision. 1000 Friends of Oregon v. Wasco County Court, 299 Or at 326.

Petitioners insist that Judge Cantrell's conduct was improper in several respects. Petitioners assert the payment for the cattle was a pay-off for a favorable vote on the petition for incorporation. Petitioners explain that the mere existence of business dealings

(even without a pay-off in fact) is sufficient to disqualify Judge Cantrell's participation. They say Judge Cantrell's failure to publicly disclose his business transactions was improper and should result in reversal of the county's decision. Petitioners argue that public officials with pecuniary interests in proceedings before them should not take part in those proceedings. Petition for Review at 17-18.

Petitioners say the circumstances of the cattle sale and the vote on the incorporation denied them an impartial tribunal, thereby violating the due process guarantee of the fourteenth amendment of the United States Constitution. Petitioners assert that Fasano v. Washington County Commission, 264 Or 574, 507 P2d 23 (1973) requires an impartial tribunal in decisions such as the one before us in this proceeding.

In addition, petitioners argue that official actions, whether or not unfair in fact, must be accompanied by the appearance of fairness. Petitioners claim that appearance of bias or unfairness is at odds with due process principles. They insist that Cantrell compromised these principles by taking part in the vote after dealing privately with interested parties.

We will discuss this last point first. The fairness doctrine has been articulated by the courts of Washington State. In Smith v. Skagit Co., 75 Wash 2nd 715, 453 P2d 832 (1969) the Washington Supreme Court overturned a county zoning decision in part because the decision lacked an appearance of fairness.[9] The court noted

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9 In this case, advocates of a rezoning met with the planning commission in an executive session. The statute under which the P.C. operated called for a "public hearing". The court reasoned the plaintiffs were denied a fair hearing both in appearance and reality.

"when the law which calls for public hearings gives the public not only the right to attend but to be heard as well, the hearings must not only be fair but must appear to be so. It is a situation where appearances are quite as important as substance." 75 Wash 2nd at 739.

The Washington Court will overturn a decision where circumstances make the decision appear to be the result of improper conduct. This conduct can include an ex parte contact on the merits of the matter between officials and interested parties. Smith v. Skagit Co., supra. Impropriety may also exist simply because of a business association between the official and the interested party. Swift v. Island County, 87 Wash 2d 348, 552 P2d 17 (1976)).[10]

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The Washington Supreme Court applies the doctrine only to quasi-udicial actions. Swift v. Island County, supra. Petitioners assert that the decision on review here is quasi-judicial in nature. Respondents disagree. Respondents argue that quasi-judicial safeguards announced in Fasano are not applicable in a legislative proceeding.

We conclude the proceeding is

In Campbell v. Board of Medical Examiners, 16 Or App 381, 518 P2d 1042 (1974) the Oregon Court of Appeals stated that where

"an administrative body is charged with the duty to render as quasi-judicial decision, it should do so with he outward indicia of fairness as well as the actuality thereof." Campbell, 16 Or App at 395.

No Oregon court has overturned a decision on the ground of appearances alone, however. So far, the Oregon Supreme Court has required that the proceeding be fair and free of actual bias. See Neuberger v. City of Portland, 288 Or 585, 590, 607 P2d

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quasi-judicial. This action is directed at a relatively small number of identifiable persons, it involves the application of existing policy to a particular fact situation, and the filing for a petition for incorporation requires the governing body to act. The governing body is not free to ignore the petition as it might elect not to proceed with legislation. See Strawberry Hill Four-Wheelers v. Benton County Bd Comm., 287 Or 591, 588 P2d 65 (1977); Neuberger v. City of Portland, 288 Or 585, 607 P2d 722 (1979).

722 (1980). We conclude the applicable standard is whether actual bias exists. See Boughan v. Board of Engineering Examiners, 46 Or App 287, 290, 611 P2d 670 (1980). We therefore reject petitioners view that the decision must be overturned because the circumstances of this incorporation proceeding lacked an appearance of fairness.[11]

The Oregon Supreme Court has held bias exists when a decisionmaker is predisposed to interpret the law in a particular fashion and either prejudges the facts, is personally biased against a party, or has substantial pecuniary interests in the proceedings. Davidson v. Oregon Government Ethics Commission, 300 Or 415, ___ P2d ___ (1985). See also Samuel v. Board of Chiropractic Examiners, 77 Or

11 Were the doctrine alive in Oregon, our opinion might be different. The facts recited below suggest unfairness as a result of the sale and the contemporaneous vote on the incorporation petition.

App 53, ___ P2d ___ (1985).[12] In Fasano,

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Professor Davis has identified five types of bias as follows:

> "The concept of 'bias' has multiplicity of meanings. Five kinds of bias can be rather clearly identified. Some are and some are not a disqualification for making a decision in an adjudication, for a rulemaker, for an enforcer, or for a legislator. Although the five kinds shade into each other and although they come in various combinations, the main ideas about bias in an adjudication may be stated in five sentences, each of which deal with one kind of bias: (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification. (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification. (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be. (4) A personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism. (5) One who stands to gain or lose by a decision either way an interest that may disqualify; even a legislator may be disqualified on account of conflict of interest."

supra, the Supreme Court stated:

"Parties at the hearing before the county governing board are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence to a tribunal which is impartial in the matter - i.e., having had no pre-hearing or ex parte contacts concerning the question at issue...." 264 Or at 588.

Some of the land use cases about bias in Oregon have arisen because of allegations of ex parte contacts by officials. See, e.g., Tierney v. Duris, 21 Or App 613, 536 P2d 435 (1975); Eastgate Theater v. Board of County Commissioners, 37 Or App 745, 588 P2d 640 (1979); Peterson v. Lake Oswego, 32 Or App 181, 574 P2d 326 (1978); Neuberger, supra.

In this context, ex parte contact includes all information relevant to the matter at hand gained outside the formal proceedings and not in the record. While ex parte contacts may affect the tribunal's partiality, the risk to the

integrity of quasi-judicial proceedings from ex parte contacts is that the decision may be made on the basis of facts not disclosed in the record. Tierney, supra. See also Samuel, supra.[13] The risk is reduced when information gained ex parte is made part of the record by disclosure in the proceeding. The function of disclosure is therefore corrective. Eastgate Theater, supra. Failure to disclose information gathered ex parte, on the other hand, will invalidate the decision. Samuel, supra.

The circumstances involving ex parte contacts is different from that in which the official is charged with bias

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13 In Samuel v. Board of Chiropractic Examiners, a board of chiropractic examiners' decision was remanded because it was found that certain members of the board dscussed the merits of Petitioner Samuel's case outside of the record of the proceeding and further failed to disclose the communication on the record of the proceeding. The Court found the petitioner's right to a fair hearing was compromised and remand was required.

because of contact with the proponent not concerning the merits of the official matter. When the decisionmaker is biased, for whatever reason, as distinguished from merely having gained relevant facts outside the record, we believe the appropriate corrective action is abstention from participation in the process, not disclosure. Failure to abstain in these circumstances will affect the right to an impartial tribunal.

In this proceeding, petitioners not only claim the facts show that Judge Cantrell was biased because of his dealings with the incorporators, but petitioners also claim that Judge Cantrell's failure to disclose his business dealings musts result in invalidation of his vote and, consequently, reversal of the Wasco County decision.

In order to prove their claim of bias, petitioners requested and we granted an evidentiary hearing. Our power to do so is found in ORS 197.835(a)(B) which provides:

"the Board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

* * *

"(B) Failed to follow the procedures applicable to the matter before it in manner that prejudiced the substantial rights of the petitioner...."

Our review of the depositions, exhibits, testimony and other evidence submitted to us in the course of this proceeding leads us to make the findings of fact listed below.

The Cattle Sale

On August 12, 1981, commissioners from Wasco and Jefferson County Courts

(including Judge Cantrell) visited Rancho Rajneesh. During that visit, representatives of the petitioners for incorporation (residents of the Ranch) advised Judge Cantrell that they were interested in purchasing cattle. This expression of interest was repeated on October 4, 1981 by John Shelfer (later Swami Jayananda), when Cantrell and his wife dined at the Ranch. Mr. Cantrell suggested that Mr. Shelfer obtain "hamburger grade" cattle, a grade sold by Cantrell.

On October 7, 1981, Shelfer, Sheila Silverman (later Ma Anand Sheila) and David Knapp (later Swami Krishna Deva) appeared before the Wasco County Court to present a petition for incorporation. The petition was deficient, and a second was submitted on October 14, 1981.

Also on October 7, 1981, Cantrell privately advised his fellow commissioners

that he intended to sell cattle to Rancho Rajneesh. However, prior to action on the petition, Cantrell did not make a public disclosure of his business dealings with representatives of Rancho Rajneesh.

On October 13, 1981, Cantrell mailed a letter to Shelfer offered cattle for sale at the following prices:

Cows, bulls and heifers	$.50 per pound
Steer calves	$.60 per pound[14]

Included in the letter was a statement that Cantrell wanted to sell cattle because "the wheat crop wasn't large enough to pay my bank loan the first of November."

Shelfer wrote a note to the Ranch foreman (Harvey) urging purchase of Judge Cantrell's cattle. The note stated:

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14 No price was given for pairs in this letter. A "pair" is a cow and her calf.

"Keep low-key so not to embarasse (sic) Rick." ARUP Exhibit 11.

On October 22, 1981, Shelfer, Harvey, and others visited Cantrell and examined his cattle. Before the visit, Ma Anand Sheila (Sheila Silverman) advised Harvey to pay the price proposed by Judge Cantrell because "we needed him." Transcript 285.[15]

During the October 22 visit, Shelfer agreed to purchase the cattle at the asking price. There is disagreement between petitioners and responent [sic] as to whether this agreement constituted a final sale. Cantrell believed the deal was closed by a handshake, a common means of closing business deals in eastern

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There is additional evidence that persons at the Ranch felt the cattle sale would provide a direct benefit to the community simply because the seller was Judge Cantrell. See Deposition of Swami Krishna Deva at 6, 24, 39-40. Even if true, this evidence does not show a connection between the sale and the vote on the incorporation petition.

Oregon.[16]

On October 25, 1981, Harvey visited Cantrell's property to reject unwanted cattle. On November 9, 1981, the cattle were delivered to the Ranch. Payment was made on November 15, 1981.

The Cattle, Their Price, Quality and Other Related Issues

The price paid for the cattle was higher than market value. Cantrell received $5,625 for 9 "pairs" (a cow and her calf). He also received $11,915 for 23,830 pounds of cattle sold by weight. There is substantial evidence in the record to show that the price for the pairs exceeded general market value by approximately $150 per pair. The other cattle, even if sold as "mixed," would have brought several cents less per pound at the nearest auction than they did in

16 According to the Wasco County District Attorney, a person failing to honor an agreement by handshake would be able to get away with dishonoring the agreement "only once."

this sale.

There is conflicting testimony about the quality of the cattle and the actual price Cantrell received for them. The cattle were not of prime quality.[17] The majority were of "dairy quality," i.e., the product of beef cattle cross-bred with dairy cattle. Typically, dairy-quality cattle bring a lower price than do beef cattle. The deal included a few cattle of good quality, however.

Although a brand inspection normally occurs earlier, the cattle were examined by a brand inspector on December 21, 1981, after delivery to the Ranch. The cattle were only in fair condition when inspected. Petitioners maintain the cattle were sold in poor condition. Respondents contend the poor condition was simply the result of the cattle

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17 Quality refers to the animal's conformation and size. Condition refers to the animal's health and appearance.

being introduced to a new environment, unfamiliar grasses and other feed, and inadequate water. There is substantial evidence that as of the date of inspection, the cattle were in worse condition than when they left Cantrell's ranch.

Petitioners argue other aspects of the sale were irregular. One such irregularity concerns the pricing method. Typically, cattle are segregated as to sex, age, color, size and weight. Prices vary according to these factors. In this transaction, the pairs were sold at $625 a pair, but the rest of the cattle were also sold at $.50 per pound. This pricing was somewhat unusual, but one which occasionally occurred in the area. We attach no particular significance to this pricing scheme.

The cattle were hauled in four loads from the Cantrell Ranch to the elevator at

Dufur, a trip of about 15 minutes. After weighing, they were loaded onto another truck for delivery to Rancho Rajneesh. On the day of the sale, Cantrell obtained an empty weight ("light" weight) for his truck from the main scale at the Dufur elevator. Late in the afternoon of the same day, three loads of cattle were weighed at the North Annex scale. The weights were recorded by Cantrell and Harvey. The weight slip for the North Annex scale is not in evidence.

Cantrell did not "light weight" the truck following each delivery. Petitioners claim this was a departure from normal practice.[18] There is credible

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[18] Petitioners argue that normal sale practice includes a "light weight" of the truck after each delivery. A "light weight" is obtained when the truck is weighed and cleaned of any waste products. The weight taken at this time is the weight used to compute the sale price. Without taking such a "light weight," petitioners argue a purchaser pays for "shrinkage." This term refers to the loss of weight because of excreted waste products. Cattle typically excrete

evidence, however, that a light weight is not considered important where, as here, the cattle do not spend more than a few minutes (15) inside the truck prior to being weighed. The weighing method used does not demonstrate a significant departure from the usual practice.

There are irregularities in the transportation records pertaining to the sale. There was no detailed transportation slip made out for the cattle on November 9, 1981. Bob Harvey wrote a transportation slip for 50 mixed cattle on the date of sale, but it did not include detail as to the kind of cattle transported. On December 22, 1981, Cantrell gave brand inspector Hodges a transportation slip for 48 cattle which

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waste products when moved, according to petitioners. There is other credible evidence, however, that siginificant [sic] shrinkage does not occur on short trips, and that whether cattle have been watered and fed prior to shipment is of critical importance to whether shrinkage will occur.

Cantrell claimed to be the original. On December 26, 1981, Cantrell wrote Shelfer enclosing a copy of this same transportation slip and stating that the original was kept by the brand inspector.

There is some disparity between the transportation slip provided by Cantrell and an earlier one written by Harvey on the day of the transfer of the cattle to the Ranch. The significance of the discrepancy is unclear. There is not sufficient evidence to show an attempt by Cantrell to overstate the number of cattle sold or their weight.

The County Court Decision

On November 4, 1981, the Wasco County Court held a public hearing on the incorporation petition according to ORS 221.040. The court accepted evidence about the boundaries of the proposed city and heard arguments about compliance with land use laws. The commissioners voted

two to one to approve the petition. Cantrell voted for approval.

The District Attorney advised the county court that it could not deny the petition for incorporation, but that it could alter the proposed boundaries. One member of the county commission ignored this advice and voted against the incorporation. Later, after a dispute with the District Attorney over the issue, the commissioner resigned. Judge Cantrell believed he had no choice but to vote for the incorporation petition.

Conclusion on the Bias Claim

In sum, the evidence is that the sale was irregular in some respects. Overall, the sale reflects an eager buyer, i.e., one who was less concerned with obtaining the best bargain possible than with meeting the requirements of the seller. The buyers and their associates may have

believed this transaction would improve their chances of favorable treatment concerning the incorporation and related proceedings. There is no proof, however, that the transaction was expressly contingent on Cantrell's vote of November 4, 1981. Indeed, the evidence does not show any discussion at all between Cantrell and the cattle purchasers about the incorporation petition then pending before the county. Nor do we find that the transaction was so one-sided as to constitute a sham or an implicit "pay-off" for his vote. Thus, we conclude petitioners have not carried the burden of proving disqualifying bias.

DISCLOSURE

What emerges from the evidence is a series of contacts between Judge Cantrell and representatives of the incorporators. The contacts are not ex parte contacts

going to the merits of the matter pending before the Wasco County Court, but are rather contacts about a cattle sale.

As discussed above, the need to disclose ex parte contacts arises out of the need to make decisions on a public record. Samuel, supra; Fasano, supra. We are aware of no case law or constitutional provision requiring disclosure of the business relationship that existed between the petitioners for incorporation and Judge Cantrell. Because we find no evidence that Judge Cantrell conferred ex parte about the incorporation proceeding with the cattle purchasers or otherwise obtained relevant information on the incorporation outside the record, disclosure of the business relationship was not required under the doctrine announced in Fasano and the cases following.

However, there is a statutory

obligation to disclose certain matters outside the record which do not go to the merits of the question before the local official. ORS 244.120(1)(a) requires a public official to disclose the nature of a potential conflict of interest:

"When involved in the potential conflict of interest, a public official shall:

> "(a) If the public official is an elected public official, other than a member of the Legislative Assembly or an appointed public official serving on a board or commission, announce publicly the nature of the potential conflict prior to taking any official action thereon." ORS 244.120(1)(a).

A potential conflict of interest is:

"(4) 'Potential conflict of interest' means any transaction where a person acting in a capacity as a public offical [sic] takes any action or makes any decision or recommendation, the effect of which would be to the private pecuniary benefit or detriment of the person or a member of the person's household,...." ORS 244.020(4).

This statutory requirement is

distinct from the right to an impartial tribunal as a concomittent of due process. The relationship between Judge Cantrell and the incorporation suggests a "potential coflict of interest" requiring discosure. However, the statutory definition supposes a direct link between the official act and the pecuniary benefit. Our review shows no such direct link.

Even if Judge Cantrell's action did result in a potential conflict of interest giving rise to a duty to disclose the conflict, breach of this duty need not results in disqualification of the decision. ORS 244.130(2) provides:

"No decision or action of any public official or any board or commission on which he serves or any agency by which he is employed shall be voided by any court solely by reason of his failure to disclose a potential conflict of interest."

In short, failure to disclose a

potential conflict of interest as exists in the case before us does not result in invaludation of the action. In contrast, failure to disclose ex parte contacts on the merit of the controversy or matter before the local official will result in invalidation. Samuels, supra. We conclude that we are prohibited from voiding the decision solely because of Judge Cantrell's failure to disclose a potential conflict of interest.

CONCLUSION

In summary, we find Judge Cantrell engaged in business dealings with the incorporators. These dealings do not show the vote on the incorporation was a direct result of the business dealings or that Judge Cantrell had prejudiced his decision as a result of his relationship with the cattle purchasers. We therefore find that Judge Cantrell did not suffer bias as a

result of his business dealings. Because we do not find bias, we do not find prejudice to petitioners' substantial rights.

Further, because we find no requirement for appearance of fairness, we do not find we have independent authority to void his vote and remand or reverse the decision. Therefore, we are unable to sustain this assignment of error.[19]

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[19] ORS 197.835(11) inferentially permits us to reverse or remand a decision because of the county commissioner's ex parte contacts. This statute was not in force at the time of the vote on the incorporation. Further, the statute does not require reversal or remand because of ex parte contacts, and we conclude the statute is more a direction to us as to when not to reverse because of ex parte contacts.

ORS 215.422 states:

"(3) No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decisionmaking body, if the member of the decisionmaking body receiving the contact:

"(a) Places on the record the

The decision of Wasco County Court is remanded.

Kressel, Chief Referee, Dissenting

I dissent from the Board's holding on the second issue remanded by the Supreme Court. The majority concludes that it was legally proper for Judge Cantrell to take part in the county court's vote on the

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substance of any written or oral ex parte communications concerning the decision or action; and

"(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

"(4) A communication between county staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section.

"(5) Subsection (3) of this section does not apply to ex parte contact with a hearings officer approved under ORS 215.406(1)."

petition to incorporate Rajneeshpuram, notwithstanding that an undisclosed and highly advantageous commercial transaction was then pending between Cantrell and representatives of Rancho Rajneesh.

In my view, the majority's conclusion is wrong. The circumstances justify disqualification of Judge Cantrell's vote on grounds of bias.

In the fall of 1981, the leadership at Rancho Rajneesh bought 48 cattle from Judge Cantrell. Although most of the cattle were of poor or fair quality, the buyers paid considerably more than the market price. Little or none of the customary bargaining over price and other terms preceeded the sale. Indeed, as the majority opinion says, the buyers showed more interest in satisfying Judge Cantrell than in getting good livestock at a fair price.

The cattle sale was closed by a

handshake on October 22, 1981. Several weeks passed between the handshake and delivery of the cattle to Rancho Rajneesh and the payment to Judge Cantrell. In the interim, Cantrell and the other two members of the Wasco County Court took up the petition for incorporation of the City of Rajneeshpuram. None of the incorporation petitioners were directly involved in the cattle deal with Cantrell, but they were closely affiliated with persons who were.

At a public hearing on November 4, 1981, the petition was contested by persons who alleged that the proposed incorporation would violate statewide planning goals. Judge Cantrell did not publicly disclose the pending cattle sale. At the conclusion of he hearing, the county court approved the petition by a two-to-one margin. Judge Cantrell voted with the majority.

The Supreme Court has put the question as follows:

"2. Whether the Wasco County judge acted improperly, with prejudice of substantial rights, rendering the Wasco county Court order invalid?" 299 Or at 376.

The question deserves an affirmative answer.

No Oregon land use case addresses the priority of an elected official's vote under the circumstances at issue here. However, assuming, as my colleagues do, that the county's decision was quasi-judicial in nature,[20] the

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20 I confess doubt as to whether the county's decision should be characterized as quasi-judicial or legislative. To me, however, the critical point is that the proceeding necessarily involved adjudicative factfinding by the Wasco County Court. See 1000 Friends of Oregon v. Wasco County Court, 299 Or 344 ___ P2d ___ (1985). Since factfinding was the task at hand, the basic elements of fair adjudicative procedure had to be employed. See Davis, Administrative Law Treatise, 2d Section 14:4 (1980). A key procedural element is that of an impartial tribunal. Withrow v. Larkin, 421 US 35 (1975). As parties to the factfinding proceeding, petitioners were constitutionally intitled [sic] to an impartial tribunal. Neuberger

controlling legal principle is well established. A fair hearing by an impartial tribunal is a basic requirement of due process under the federal constitution. That principle is at considerable risk where the factfinding/decisionmaking functions and the opportunity for private gain stand as close together as they do in this case. The U.S. Supreme Court has stated:

"Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness'. In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome, and in which he as [sic] been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, 421 US 35, 46-47 (1975) (citations omitted).

Concededly, Judge Cantrell would not

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v. City of Portland, 288 Or 585, 588, 607 P2d 722 (1980); Fasano v. Board of Commissioners of Washington County, 264 Or 574, ___ 507 P2d 23 (1973).

gain directly from his vote on the incorporation petition. A direct connection would remove nearly all doubt on the bias issue. See Tumey v. Ohio, 273 US 510 (1927); Gibson v. Berryhill, 411 US 564, 579 (1972). See Generally, Annot., Disqualification for Bias or Interest of Administrative Officer Sitting in Zoning Proceedings, 10 ALR 3d 694 (1966). However, the due process principle extends beyond situations where there is a direct link between the decisionmaking function and the potential for private gain. Even an indirect link is sufficient to disqualify a government decisionmaker for bias if the situation is one which would tempt the average man to forget the burden of proof. See Ward v. Village of Monroeville, 409 US 57, 60 (1972). The principle takes into account human nature as well as the presumption of official honesty. One who claims that a

decisionmaker is biased has a heavy burden. The challenger must demonstrate that the surrounding factual circumstances reveal unfairness or the "probability of unfairness" Withrow v. Larkin supra, 421 US 35 at 47.

The majority opinion does not acknowledge the scope of the due process principle. The opinion seems to say that a finding of impropriety should be made only where there is a direct connection between the official action (here, the vote) and private gain or where the decisionmaker receives a transparent "pay-off" for the official action. This approach is too narrow. It does not realistically preserve the fairness of the factfinding process.

Oregon courts have taken a more realistic view of the problem. For example, in Samuel v. Board of Chiropractic Examiners, 77 Or App 53, ___

P2d ___ (1985), the Court of Appeals held that a member of a state licensing board should have disqualified himself from a revocation proceeding where litigation between the member and the licensee indicated personal animosity between them. The court stated:

"The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself." 77 Or App at 61 (emphasis added).

Another Oregon case endorses the idea that where the surrounding circumstances logically impair a factfinder's neutrality, the proper course is disqualification. Boughan v. Board of Engineering Examiners, 46 Or App 287, 611 P2d, 670 rev den (1980).

Although this is a land use case and involves a charge of favoritism rather than animosity, I see no reason to ignore

the principle recognized in prior cases. More than a decade ago, the Oregon Supreme Court observed that the land use decisionmaking process can be contaminated by "...the almost irresistible pressures that can be exerted by private economic interests on local government." Fasano v. Board of Commissioners of Washington County, 264 Or 574, ___ 507 P2d 23 (1973). See also, Eastgate Theatre Inc. v. Board of Commissioners of Washington County, 37 Or App 745, 754 588 P2d 640 (1978). The record in this appeal shows an attempt by close allies of the incorporation petition to economically pressure Judge Cantrell. The cattle deal was never expressely [sic] linked to the pending incorporation petition. However, Cantrell's acceptance of the bargain is sufficient, in my view, to disqualify him from taking part in the incorporation proceeding. The probability that his vote was influenced by his

private interests is too high to be constitutionally tolerated. Withrow v. Larkin, supra.

Petitioners' rights were prejudiced by Judge Cantrell's failure to publicly disclose the cattle sale and to disqualify himself from the incorporation proceeding. Petitioners were entitled to, but did not have the benefit of an impartial factfinder.[21] Fasano v. Board of Commissioner of Washington County, supra, Neuberger v. City of Portland, 288 Or 585, 588, 607 P2d 722 (1980).

Judge Cantrell's decisive vote should

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21 The case for disqualification would be weaker if the county court's application of the statewide goals was subject to full de novo review here. See Davidson v. Oregon Government Ethics Commission, 300 Or 415, 428-29, ___ P2d ___ (1985) (substitution of hearings officer not improper where officer's findings of fact not binding); Fuentes v. Roher, 519 F2d 379, 389-90 (2d Cir. 1975); Lenz v. Coon Creek Watershed District, 152 NW2d 209 (1967). However, our review of the county's decision is not de novo. We are bound to accept any finding of fact made by the county for which there is substantial evidence in the record ORS 197.830(11).

not be counted. The county's approval of the incorporation petition should therefore be reversed.

Appendix E

SUPREME COURT OF THE UNITED STATES

No. A-653

1000 FRIENDS OF OREGON, ET AL.,

Applicants,

WASCO COUNTY COURT, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 14, 1988.

s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court
of the United States

Dated this 26th

day of February, 1988.